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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1986

STATE OF IDAHO,

Respondent,

and

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION

Intervenor/Respondent,

vs.

THE COEUR D'ALENE TRIBE OF INDIANS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit was in error in its findings of fact and law that the cottage and floathome leasing to private parties did not violate the forfeiture-reversion conditions of the Heyburn Park Patent of 1911 (Exhibit VI) basing its decision on two erroneous findings of fact and one erroneous conclusion of law as follows:

a. That a general legal custom and usage prevailed in federal lands and parks permitting similar private cottage leasing.

b. That the statutes of the State of Idaho allowed and actually encouraged private cottage site leasing in Heyburn Park.

c. That the rules of constuction (of the Patent of 1911) against forfeitures in favor of grantees were applicable rather than the opposite rules of construction against grantees (in this case Idaho in the Patent of 1911) and in favor of tribes (in deeds of tribal land held in trust for the tribe by the United States.)

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	2
Jurisdiction	2
Relevant Statues	2
Statement of Case	8
Argument:	
I. The Leasing of Cottage Sites Was and Still is the Exception Rather than the Rule in National Parks and Forests	14
II. The Ninth Circuit Clearly Wrong in its Understanding of Applicable Idaho Codes as Including Power of Cottage Leasing	15
III. The Ninth Circuit Court Clearly in Error in its Conclusion that the Rules of Construction Against Forfeitures Govern Rather than the Rules of Liberal Construction in Favor of the Tribe	19
Conclusion	22

TABLE OF AUTHORITIES

Cases: Page

Carpenter v. Shaw, 280 U.S. 363, 74 L.Ed. 478, 50 S.Ct. 121 (1930) 21

Idaho v. Hodel, 814 F.2d 1288 (9th Cir., 1987) 2, 10-15, 18-20

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973) 21

Statutes:

16 U.S.C. §162(a) 14

16 U.S.C. §202 14

28 U.S.C. §[6] 1254..... 2

Idaho Code §39-3613 6

Idaho Code §67-4202 ..... 6, 15

Idaho Code §67-4204 ..... 6, 17, 19

Idaho Code §67-4218 ..... 7, 16

Idaho Code §67-4219 ..... 7, 12

Idaho Code §67-4223 ..... 7, 12, 15, 16

Idaho Code §67-4224 ..... 8, 16

Idaho Code §67-4230 8

Articles of Agreement of 1887 (ratified by Congress, 1891) 25 Stat. 1002 5

Coeur d'Alene Allotment and Settlement Act of 1906, 35 Stat. 335, III Kappler 204 2

Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326..... 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the Opinion of April 29, 1987, No. 84-4145, 814 F.2d 1288, 1987.

OPINION BELOW

The opinion of the United State Court of Appeals for the Ninth Circuit is reported at 814 F.2d 1288 (9th Cir., 1987). A copy is appended as Exhibit I. The Ninth Circuit's order denying the petition for rehearing is not reported. A copy of the order is appended as Exhibit II. The Memorandum Decision of the District Court for the District of Idaho, unreported, of November 8, 1979 is appended as Exhibit III.

JURISDICTION

Jurisdiction to issue the Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. §1254. The opinion to be reviewed was issued on April 9, 1987. The Coeur d'Alene Tribe filed a timely petition for rehearing. The Order denying the petition for rehearing was issued May 28, 1987.

RELEVANT STATUTES

The Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kappler 204, provides in relevant part:

> The the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.
>
> That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall have been

surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and six acres,...

That upon the completion of said allotments to said Indians the residue or surplus lands...of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior ...and shall be appraised under their appropriate classes...and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws,...

The full text of this statute is appended as Exhibit IV.

The Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326, provides in relevant part:

That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to-wit:...is reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, and conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

The full text of the statute is appended as Exhibit V.

The presidential patent of June 29, 1911, provides in relevant part:

Whereas, the Act of Congress April 30, 1908—35 Stat. 70, 78—, authorizes the conveyance to the state of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho,...to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said state held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the state, or shall be alienated by said state; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same:...

The full text of the patent is appended as Exhibit VI.

The Presidential order of November 8, 1873 establishing the Coeur d'Alene Reservation, provides as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

"Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

A copy of the Presidential Order is appended as Exhibit VII.

The Articles of Agreement of 1887 (ratified by Congress in 1891, 25 Stat. 1002) by which the Tribe ceded its aboriginal lands and the Congress affirmed and rational the establishment of the Coeur d'Alene Reservation, provides in relevant part:

ARTICLE 2: For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation...

ARTICLE 5: In consideration of the foregoing cession and agreements, it is agreed that the Coeur

> d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation...

The full text of this Agreement, as ratified by Congress, is appended as Exhibit VIII.

IDAHO CODE SECTIONS:

Idaho Code 39-3613, provides in relevant part:

> 39-3613. Continuation of cottage site lease program. — (1) The legislature of the state of Idaho recognizes that certain state lands are presently leased for cottage site uses and are subject to leases and contracts duly authorized by law. It is legislative intent to continue to recognize such leases. However, it is also legislative intent that no new or additional lands be platted, subdivided or leased for cottage site leases, unless and until the condition and precedents listed below have been met...(1975)

The full text of this Statute is appended as Exhibit IX.

Idaho Code 67-4202. Full text appended as Exhibit X.

Idaho Code 67-4204 provides:

> 67-4204. Heyburn Park — Granting of concessions. — The park and recreation board of the department of parks and recreation is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating

facilities upon the waters within said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties ahll be permitted to construct wharves within said park.

The board shall also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people within discrimination as to race, under such rules and regulations as are to be provided as aforesaid. (1911)

The full text is appended as Exhibit XI.

Idaho Code 67-4218. Full text appended as Exhibit XII.

Idaho Code 67-4219. Full text appended as Exhibit XIII.

Idaho Code 67-4223 provides in relevant part:

67-4223. Powers of board. — The park and recreation board shall have the power to:...(g) Construct, lease or otherwise establish public park or recreational privileges, facilities and conveniences and to operate said recreational services and to make and collect reasonable charges for their use or to enter into contracts for their operation. The net proceeds derived shall be credited to the park and recreation fund created in section 67-225, Idaho Code, and are hereby specifically appropriated to defray the cost of the public park or recreational services. The department is specifically authorized to enter into contracts with the United States and its agencies which require that the state expend any excess of revenue above expenses for improvements of the recreational or park area from which the excess was derived....(1965)

The full text of this Statute is appended as Exhibit XIV.

Idaho Code 67-4224. Full text appended as Exhibit XV.

Idaho Code 67-4230. Full text appended as Exhibit XVI.

STATEMENT OF THE CASE

The Coeur d'Alene Indian Reservation in northern Idaho was established by Executive Order of President Grant in 1873 (Exhibit VII). This Executive Order was not ratified by Congress until 1891 when it ratified the Articles of Agreement of 1887 (Exhibit VIII) by which the United States in Article 5 agreed "that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation ...and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

Despite this guarantee by the United States it, without any consent whatever of the Tribe or its members, enacted the Coeur d'Alene Allotment and Settlement Act of 1906 (Exhibit IV) which provided for the allotment of a portion of the Reservation to tribal members and opened the rest of the Reservation for homesteading. As a result of this Act more than 2/3 of the Reservation passed out of tribal and Indian ownership. Prior to the allotment and settlement there was congressional discussion of the possibility of opening a National Park in the area that is now known of as Heyburn Park in the northern end of the reservation. Failing that, there was enacted the Act of 1908 (Exhibit V) which authorized the Secretary to convey what is now known as Heyburn Park (approximately 6700 acres of land

on the north end of the reservation fronting on beautiful Lake Coeur d'Alene and its tributary Lake Chatcolet). As a result of this Act, President Taft through the Patent of 1911 (Exhibit VI) transferred all of Heyburn Park to the State of Idaho for the stated consideration of $11,379.17.

While it is contended by the state that there is evidence of tribal consent to this transfer the most that the record shows is that the tribal leaders had some knowledge of the plan for a national park and supported that idea. There is not a scintilla of evidence that the tribal leaders gave any consent to or in fact had any knowledge of the transfer of the land to the State of Idaho for a state park.

The Patent provided in relevant part:

> Whereas, the Act of Congress approved April 30, 1908 35 Stat., 70, 78—, authorizes the conveyance to the State of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho,...to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and
>
> Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said State held, used, and maintained solely as a public park, and for no purposes inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event

> of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same:. . .

All parties and courts have agreed that the patent language creates a fee simple subject to a condition subsequent giving rise, upon violations of the conditions of the patent, to a right of re-entry in which the title to the park would revert to the United States in trust for the Tribe.

As the Court points out, page 1290, Heyburn substantially encloses and fronts on Chatcolet Lake which is a part of beautiful Coeur d'Alene Lake and reputed to be the most beautiful part of the Lake and of the Reservation. In 1920 and thereafter Idaho began issuing a large number of permits to maintain float homes on the lake frontage, and picking out several acres of the choicest locations within the park, engaged in many (about 160) cottage site leases. The leases and permits were granted for periods of up to ten years and were regularly renewed and each entitled the lessee to "the exclusive right and privilege to possess and use (the site) in the manner and for the purpose hereinafter contained."

As the court on page 1291-1292 (Pet. App., p. 7-8) summarizes, the relevant procedural history is as follows:

> B. Procedural History
>
> Idaho filed suit in federal district court on December 30, 1976, seeking a declaratory judgment that its lease and permit practices did not violate the "public park" and anti-alienation conditions in the patent.

> In the alternative, Idaho sought a declaration either that its decision not to renew leases and permits constituted compliance with the Department of Interior's request so as to avoid forfeiture, or that granting one-year leases would comply with the patent. On September 7, 1977, the United States filed a complaint claiming the practices violate the conditions in the patent and seeking to quit title to the property. The suits were consolidated for trial and the court granted the Tribe and the Heyburn State Park Leaseholders Association (Leaseholders) leave to intervene.
>
> On November 9, 1979, the district court granted Idaho's motion for summary judgment, concluding on the basis of its findings of undisputed facts that Idaho had not violated the conditions in the patent. Both the United States and the Tribe appealed, but before oral argument the United States moved to voluntarily dismiss its appeal, and a panel of this court granted the motion....

As the Court of Appeals relates (page 1291 et seg. Pet. App. p. 7-8) this case has been before it three times with it having remanded it to the District Court on two occasions. The questions at issue in those remands were the standing or right of the Tribe to maintain the appeal with the United States having been dismissed and whether the Tribe could "exercise the power of termination." The District Court held against the Tribe on each occasion and the Court of Appeals reversed its holding both times. The matter and content of those appeals are not relevant to this Petition.

What is relevant to this Petition is the Appeals Court's final ruling on the Appeal of the Tribe from the Decision of the District Court of November 9, 1979 (Exhibit III) which held that the leasing by the State of cottage and floathome sites was not in violation of the 1911 patent (Exhibit VI)

and did not constitute sufficient reason to forfeit or terminate the rights of Idaho under the patent and cause a reversion of title, to the United States in trust for the Tribe.

The Court of Appeals affirmed the 1979 decision in its April 9, 1987 decision that is the subject of this Petition (Exhibit I). The Ninth Circuit in affirming the District Court's 1979 decision found, first, that the general rules of forfeiture prevailed. It stated that "Forfeiture provisions are not favored in the law." (p. 1292 Pet. App. p. 11) and are construed with "great strictness." It then found that there existed at the time of the initial leasing a general practice by the United States and State Governments allowing leasing of federal, state and park lands.

The Court then turned to Idaho practices and statutes as follows:

> ...The Idaho legislature has delegated the power to operate, maintain and develop state parks to the Idaho department of parks and recreation. Idaho Code §67-4219. Pursuant to this delegation of authority, the park and recreation board exercises vast powers in its administration of the Idaho state park system. Idaho Code §67-4223. The park and recreation board is vested with the authority to lease park land in all Idaho state parks, Idaho Code §67-4223(g) (1986 Supp.), and specifically in Heyburn State Park, Idaho Code §67-4204. This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right. Absent such deference the federal courts will become embroiled in the day-to-day operation of state parks....

Then, acting on the assumption that its understanding of the Idaho statutes was correct, it "deferred" to them and held that, under the circumstances of the case, "forfeiture is

not an appropriate remedy."

The court went further (page 1297, Pet. App. p. 22) and held that the long term leasing practices in the park did not violate the anti-alienation provision of the patent. It held that leasing did not constitute the prescribed alienation because "...the more commonly understood meaning of the word is that an alienation is a complete transfer of title rather than a transfer of a leasehold interest."

As the Tribe argues herein, the floathome and cottage site leasing constituted clear violations of the terms of the patent justifying forfeiture under the terms of the patent.

ARGUMENT

This petition seeks review of the Ninth Circuit decision which held that, despite what appeared to be clear violations of the Patent of 1911, forfeiture of title, in accordance with the terms of the patent, was not an appropriate remedy. The Court based this conclusion on two erroneous findings of fact and one erroneous conclusion of law as follows:

1. It found that there was a general custom and usage in federal lands and parks which allowed such cottage leasing.

2. It found that Idaho had clearly provided for such powers (of leasing cottage and floathome sites) in its applicable statutes.

3. It found that the canons of construction did not favor forfeitures and that the Tribe was not entitled to the benefit of the general rule of construction of patents of Indian land by which the 1911 patent should

have been construed in favor of the Tribe.

The Court was in error on each of these findings and its conclusion of law.

I. The Leasing of Cottage Sites Was and Still is the Exception Rather than the Rule in National Parks and Forests.

While the record includes instances of leasing of public lands in national forests and parks and in some instances in states and municipal parks, it lacks a single instance of the upholding of such leasing when title is held under the terms of a third party conveyance such as the Patent of 1911 (Exhibit VI). The Ninth Circuit cites a number of precedents (page 1295, Pet. App. p. 18-19). None of them is applicable or relevant. None involve restrictions and reversionary provisions such as found in the 1911 patent.

On the contrary, in almost every instance, the cited leasing was clearly legal. This was true as to Glacier Park where leasing was initially legal but was finally prohibited by federal statute in 1931. (16 U.S.C. 162(a)). The Court mentions Lassen Volcanic National Park (p. 1294, Pet. App. p. 16) but in that case a specific statute (16 U.S.C. 202) authorized limited leasing. The Court mentions Mackinac Island State Park (p. 1294, Pet. App. p. 16) as a precedent as having conditions similar to the 1911 patent and yet allowing cottage site leases. Prior to the patenting of the Mackinac Island Park to the state in 1895 there was express congressional authorization of cottage site leasing. The island park was filled with leased parcels and this practice was continued after transfer of title to the State.

The Appeals Court was in error in holding that private cottage site leasing was customary in National parks and

forest lands. The fact is that it was actually rare and, in no instance was it allowed where there were express limitations and rights of re-entry and reversion as expressed in the Heyburn 1911 patent.

II. Ninth Circuit Clearly Wrong in its Understanding of Applicable Idaho Codes as Including Power of Cottage Leasing.

1) On page 1295 (Pet. App. p. 18-19) the Court states:

> "The park and recreation board is vested with authority to lease park land in all Idaho state parks, Idaho Code 67-4223(g) (1986 Supplement) and specifically in Heyburn State Park, Idaho Code 67-4202. This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right.

In this fashion, the court leaps from a conclusion that the park and recreation board has the authority to lease park land to a finding that it has that policy to which the court should defer. The fact is that there is (and was) no such authority (to engage in cottage leasing) and that the policy was the opposite — no leasing.

The cited provision (4223(g)) (Exhibit XIV) was, before a non-relevant amendment to another part of the Act, Section (e) of the 1965 Act enacted long after the offensive leasing began. The only reference it makes to leasing is the following phrase:

> "The park and recreation board shall have power to: . . .(g) Construct, lease or otherwise establish public park or recreational privileges, facilities and conveniences and to operate said recreational services and to make and collect reasonable charges for their use or to enter into contracts for their operation."

Code section 4223 is the statutory grant of power to the Board. No place else in that section, except as quoted above, is there any reference to leasing. The write respectfully points out that it is "reaching real far" to interpret the foregoing quoted sentence as granting Idaho authority to enter into cottage leases. The most it grants is power to lease land and facilities for parks, not to lease park lands out to private individuals. Let us review the rest of the statute.

Section (a) authorizes it to "adopt, amend or rescind rules and regulations as may be necessary for the proper administration of the provisions of Section 67-4218, et seq., Idaho Code, etc" (all enacted in 1965). There are no rules or regulations promulgated by this board which would authorize cottage leasing. Nowhere in the cited statutes (67-4218, et seq.) is this authorization found. Instead is the broad authorization and mandate to acquire and operate parks for the maximum benefit of the public. 67-4219: ..."put into execution long range, comprehensive plan and program for the acquisition, planning, protection, operation, maintenance, development and wise use of areas of scenic beauty, recreational utility,...to the end that the health, happiness, recreational opportunities, and wholesome enjoyment of life of the people may be further encouraged..." 4224 (Exhibit XIV): "...acquire in the name of the state ...by gift, devise, purchase, agreement or otherwise, such land, etc."

The policy of the State of Idaho was never to lease for private use to anyone. It has always been to so administer the parks that the maximum benefit is gained by the public as now enunciated in these recent statutes.

As the term "leasing" is used once or twice and, in the context of other Idaho statutes, its meaning has to be limited to various concessional facilities for public use and to leases by the State itself of public recreational and park facilities.

The court went further and cited Idaho Code 67-4204 (enacted in 1911) as evidencing the policy of the State to permit cottage site leasing. That code provision specifically refers to Heyburn Park as follows:

> "67-4204 (Exhibit XI). Heyburn Park — Granting of concessions. — The park and recreation board of the department of parks and recreation is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within the said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties shall be permitted to construct wharves within said park.
>
> The board also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people without discrimination as to race, under such rules and regulations as are to be provided as aforesaid."

The foregoing code provision, relating specifically to Heyburn Park, enacted in 1911, the year of the 1911 patent, is the sole statutory basis for any leasing in Heyburn Park.

It obviously limits the "leases, concessions and privileges" to "three places of refreshment and entertainment

within said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within the said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties shall be permitted to construct wharves within said park."

This statute, far from being a grant of authority for the leasing of cabin sites, even denies the park and recreation board the right to permit private parties "to construct wharves within said park." The record shows that this statute was enacted to show a statutory compliance by Idaho to the terms of the 1911 patent. It is the only stated statutory or regulatory "policy" of Idaho for the administration of lands within the park. The Ninth Circuit states (on page 1295, Pet. App. p. 19) that "This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right." The writer responds that the foregoing policy, restricting leasing and concessions, is in perfect conformity with the requirements of the 1911 patent. The statute was enacted to be in conformity and compliance. The court in so deferring should now enforce that policy which did not include the authority to engage in private cottage site leasing.

It is further pointed out that the floathome leases are in obvious violation of this statute being in effect "wharves" owned by private parties.

Concluding this part of its decision (page 1296, Pet. App. p. 20) the court stated:

> "In this case, we cannot conclude that the Idaho park and recreation board exceed its ample authority through its leasing practices."

As aforesaid, the Board has no such authority (ample or otherwise) expressed or implied in any statute or regulation. The fact is that the leasing of private cottages and floathomes was in violation of the State's only relevant statute governing Heyburn, Idaho Code 67-4204.

The finding by the Court that Idaho had statutory leasing authority was an essential part of its decision against forfeiture. Its misunderstanding of the Idaho law is emphatically and clearly stated on page 1295 (Pet. App. p. 19). The Court was absolutely wrong in its interpretation of Idaho law. For this reason alone this Court should grant review and reverse.

III. Court Clearly in Error in its Conclusion that the Rules of Construction Against Forfeitures Govern Rather than the Rules of Liberal Construction in Favor of the Tribe.

The court sets up an overwhelming rule of construction against forfeiture. As to the Tribe's contention that the Patent must be construed strictly against Idaho the court states in its footnote 5 (page 1293, Pet. App. p. 14) that the canon of construction favoring the Tribe "does not apply in this case; the patent here involves an agreement between the United States and Idaho, not between the Tribe and the United States (for any other party.)"

The Court is incorrect in saying that this is an "agreement between the United States and Idaho." It is a grant of land to Idaho pursuant to the Act of 1908. The land granted is key tribal land on the Coeur d'Alene Reservation the beneficial title to which was in the Tribe and the legal title in the United States as trustee of the Tribe. The only "agreement" with Idaho was its acceptance of the patent with its forfeiture language and its payment of the $11,379.17.

The dissent deals with this on page 1300 (Pet. App. p. 30) but in the context that "where relief other than forfeiture is sought, the general requirements that a term be construed strictly against the party seeking relief does not apply." Judge Reinhardt then cites the general rule "the federal land grants are to be construed favorably to the federal government"...and that..."ambiguities are to be resolved against the grantee."

This rule of construction is amplified when dealing with Indian trust land when the United States is held to the strict standards of a fiduciary.

We have here the combination of two powerful rules of construction:

1. The rule of strict construction when the dedication is by a third party (here the U.S.) rather than by the state itself. The rules of construction are entirely different when the dedication is by the third party (here the U.S.) in which case the words of the dedication (here "to be by said state held, used, and maintained solely as a public park, and for no purpose inconsistent therewith") are strictly construed against the grantee.

2. The presumptions and rules of construction that come into play when dealing as a trustee with Indian lands.

This point is pivotal.

The doctrine of strict construction applies when dealing with Indian lands. Here, as aforesaid, the U.S. held the title to the Heyburn lands in trust for the Coeur d'Alene Indian Tribe. The lands were a key part of the Coeur d'Alene Reservation. They were, by virtue of the Act of 1908, being deeded or granted to the State of Idaho "to be by said state held, used, and maintained solely as a public

park, and for no purpose inconsistent therewith." The majority brushes off the rule of strict construction that should prevail because, according to it, this is not an agreement between the U.S. and the Tribe but between the U.S. and Idaho. It is in fact an agreement between Idaho and the Tribe, acting through its trustee, the U.S.

In this combination of the 1908 Act and the 1911 patent, we must look to congressional intent. In determining that intent we are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), as quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 74 L.Ed. 478, 50 S.Ct. 121 (1930).

The Ninth Circuit clearly erred in its conclusion of law that deprived the Tribe from the benefit of the foregoing rules of construction. The 1911 Patent deeding this key tribal trust land to Idaho must be construed strictly against Idaho. The Ninth Circuit did the opposite, it construed it strictly against the Tribe.

CONCLUSION

The preceding argument clearly indicates that the Ninth Circuit was in error in its two pivotal findings of fact. They were its finding of general custom and usage of allowing private cottage leasing of national forest and park lands and its finding that Idaho's statutes allowed cottage leasing of its park lands. The opposite was true. There was and is no such federal precedent and there are no Idaho statutes giving Idaho the leasing powers which the Ninth Circuit found existed.

The Court was also clearly wrong in its legal finding or conclusion that the presumptions and canons of contruction against forfeitures in general applied rather than the rules which in this case require a strict interpretation of the 1911 patent against the Idaho state grantee and a liberal construction in favor of the Tribe.

The Tribe's petition herein for a Writ of Certiorari should therefore be granted.

DATED this _____ day of July, 1987.

Respectfully submitted,

DELLWO, RUDOLF & SCHROEDER, P.S.

ROBERT D. DELLWO
Attorney for the Coeur d'Alene Tribe

87 -1 99

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1986

STATE OF IDAHO,

Respondent,

and

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION

Intervenor/Respondent,

vs.

THE COEUR D'ALENE TRIBE OF INDIANS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Exhibit I -- Opinion of the United States Court of Appeals for the Ninth Circuit, Reported at 814 F.2d 1288 (9th Cir., 1987) 1

Exhibit II — Ninth Circuit's Order Denying Petition for Rehearing (unreported) 40

Exhibit III — United States District Court for the District of Idaho, Memorandum Decision (unreported) 41

Exhibit IV — Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat, 335, III Kappler 204 50

Exhibit V — Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326 56

Exhibit VI — Presidential Patent of June 29, 1911 57

Exhibit VII — Presidential Order of November 8, 1873 establishing the Coeur d'Alene Reservation 60

Exhibit VIII — Articles of Agreement of 1887 with Coeur d'Alene Tribe of Indians, (ratified by Congress, 1891, 25 Stat. 1002, II Kappler 420) 61

Exhibit IX — Idaho Code §39-3613 67

Exhibit X — Idaho Code §67-4202 69

Exhibit XI — Idaho Code §67-4204 70

Exhibit XII — Idaho Code §67-4218 71

Exhibit XIII — Idaho Code §67-4219 72

Exhibit XIV — Idaho Code §67-4223 73

Exhibit XV — Idaho Code §67-4224 77

Exhibit XVI — Idaho Code §67-4230 78

EXHIBIT I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4145 DC #CV 1-76-231 MJC OPINION

THE STATE OF IDAHO, Plaintiff-Appellee,

and

THE MEMBERSHIP OF THE HEYBURN STATE PARK
LEASEHOLDERS ASSOCIATION, Plaintiff-Appellee,

vs.

DONALD P. HODEL*, Secretary
of the Department of the Interior of
The United States of America, Defendant

and

THE COEUR D'ALENE TRIBE OF INDIANS
Defendant/Intervenor-Appellant

Argued October 9, 1985 — San Francisco, California
Submitted November 1, 1985

Filed April 9, 1987

Before: Stephen Reinhardt, Robert R. Beezer and
Cynthia Holcomb Hall, Circuit Judges.

Per Curiam

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*Donald P. Hodel has been substituted for William P. Clark as defendant in this appeal pursuant to Fed. R. App. P. 43(c)(1).

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, United States District Judge, Presiding

I. SUMMARY
Public Lands

Appeal from judgment. Affirmed.

This action arises from the Coeur d'Alene Indian Tribe's claim that the state of Idaho violated their terms of a patent by which land which was formerly part of the Tribe's reservation was conveyed to the state. Title to the land would revert to the United States if the lands were not used by the state as a public park or if the state alienated the lands. The state issued permits to maintain float homes on Lake Chatcolet, which is within the land's boundaries, and leased waterfront cottage sites. The Solicitor of the United States informed the Attorney General of Idaho that the Solicitor's office had concluded that Idaho was not in compliance with the conditions of the conveyance. As a protective measure in the case of a law suit, the Idaho Board of Land Commissioners decided not to renew cottage site leases or float-home permits upon their expiration.

Idaho filed suit seeking a declaratory judgment that its lease and permit practices did not violate the public park and antialienation conditions in the patent. The United States then filed a complaint claiming the practices violate the conditions of the patent and seeking to quiet title to the property. The two actions were consolidated and the

Tribe was granted limited leave to intervene. The district court granted Idaho's motion for summary judgment, concluding on the basis of its findings that Idaho had not violated the conditions in the patent. Before oral argument on the appeal, a panel of this court granted the United States' motion to voluntarily dismiss its appeal. With only the Tribe remaining, Idaho moved to dismiss the appeal on the ground that no case or controversy existed because any property interest flowed to the United States. This court remanded to the district court for a determination of whether the Tribe possessed a beneficial interest in the power of termination.

The district court held that the Tribe does not have a beneficial interest in the power of termination and this court reversed and remanded for further proceedings including a determination of the nature and extent of that interest. The district court then held that only the United States, and not the Tribe, could exercise the power of termination.

1. Forfeiture provisions are construed liberally in favor of the holder of the estate, and a construction which avoids forfeiture must be adopted if at all possible.

2. Here, there is no indication as to Congress's intent regarding the appropriate law to apply. Accordingly, where federal law is of no avail this court is guided by Idaho law.

3. Idaho law govering deeds dictates that a court interpreting a deed should be guided by the intention of the parties.

4. Accordingly, in construing the phrase "to be held, used, and maintained solely as a public park" this court must attempt to give effect to the intent of the United

States, as expressed by Congress.

5. If there is a legitimate questions as to whether those violate the patent, forfeiture is barred.

6. The uncontroverted evidence in the record shows the following: By 1928, at least seven states leased summer homes in their state parks.

7. Additionally, the federal government permits permanent private landholdings in the national parks.

8. The shift in the federal government's leasing policy toward eliminating leaseholds on virtually all its lands does not mean that the terms of the original Act also shift or change over time in such a way as to mirror current notions concerning the proper use of public parks.

9. In light of the prevalence of cottage leasing in national as well as state parks in the early 1900's, it is obvious that Congress did not intend to prohibit the practice.

10. The evidence that leasing practices historically were considered to be proper park uses is sufficient to preclude a holding that Idaho has clearly violated the public park restriction.

11. Federal courts should not interfere with a state's administation of its parks unless it is necessary to protect an important federal right.

12. In this case this court cannot conclude that the Idaho park and receration board exceeded its ample authority through its leasing practices.

13. While there is some authority for the proposition that leasing may be considered an alienation of land, the more commonly understood meaning of the word is that an

alienation is a complete transfer of title rather than a transfer of a leasehold interest.

While agreeing that forfeiture is not appropriate, one judge afforded the Tribe declaratory or injunctive relief because the leasing practice complained of here does not constitute a public park use and is contrary to the provisions of the federal land patent.

COUNSEL

Robie G. Russel and C. A. Daw, Boise, Idaho, for the plaintiff-appellee.

John S. Chapman and Christopher W. Clark, Boise, Idaho, for the plaintiff/intervenor-appellee.

Robert D. Dellwo and Gary T. Farrell, Spokane, Washington, for the defendant/intervenor-appellant.

OPINION

PER CURIAM:

The Coeur d'Alene Tribe of Indians contends that the State of Idaho has violated the terms of a 1911 patent by which land formerly part of the Tribe's reservation was conveyed to Idaho for use as a public park. The Tribe appeals two decisions of the district court: a 1979 grant of summary judgment for Idaho, and a 1984 decision holding that even if Idaho breached the patent the Tribe may not exercise a power of termination. We hold that the Tribe may pursue this appeal irrespective of its ability to exercise a power of termination, but we conclude that the Tribe is not entitled to forfeiture.

BACKGROUND

A. HEYBURN STATE PARK

The Coeur d'Alene Indian Reservation, comprising approximately 590,000 acres in Idaho, was established by Executive Order of President Grant in 1873. Pursuant to the Allotment Act of 1906, ch. 3504, 34 Stat. 325, 335, Congress authorized the allotment of 160 acres of reservation land to each member of the Tribe and opened up the unalloted lands to homestead entry.

Two years later, before the reservation was opened for settlement, Congress withdrew 6,774.65 acres of the land from settlement and allotment by the Act of 1908, ch. 153, 35 Stat. 70. The Act of 1908 authorized the Secretary of the Interior to convey the withdrawn land to Idaho for use as a public park. 35 Stat. 78, 79. The land that is now Heyburn State Park was conveyed to Idaho on June 28, 1911, under a patent setting forth the following conditions:

> the lands are to be by said state ***held, used, and maintained solely as a public park***, . . . the title to revert to the United States . . . absolutely if the said lands, or any portion thereof, shall not be . . . so used and maintained by the state, or shall be alientated by said state; and in event of the violation by the state of any of the conditions . . . , then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands . . . and have, hold, seize, and possess the same . . .

(emphasis added).

The park includes within its boundaries Lake Chatcolet.

In 1920, Idaho began issuing permits to maintain float homes on the lake. The State also began leasing waterfront cottage sites. The leases and permits were granted for periods of up to ten years and were regularly renewed until 1976. A lease entitled the lessee to "the exclusive right and privilege to possess and use [the site] in the manner and for the purpose hereinafter contained," but prohibited commercial use and required the lessee to substantially improve the leasehold within two years.[1] In 1975, the Idaho legislature expressly indicated its intent to continue the cottage site leasing program on its state lands, *see* Idaho Code §393613 (1985), and imposed additional requirements on lessees primarily concerning water and sewage control, *see id.* §39-3609 to -3613. In 1976, there were 161 sites leased and 32 existing float home permits in Heyburn State Park covering approximately 21 acres.

In 1972, an Assistant Area Director of the Bureau of Indian Affairs, on behalf of the Tribe, wrote to the Director of the Idaho Department of Parks suggesting that the cottage site leasing program violated the terms of the patent, and by letter dated March 3, 1976, the Solicitor of the United States Department of the Interior informed the Idaho Attorney General that the Solicitor's Office had concluded that Idaho was "not in compliance with the conditions of the [1911] conveyance." As a protective measure in the event of a lawsuit, the Idaho Board of Land Commissioners decided on March 9, 1976 not to renew cottage site leases or float-home permits in Heyburn State Park upon their expiration. All leases and permits expired in 1981.

B. PROCEDURAL HISTORY

Idaho filed suit in federal district court on December 30, 1986, seeking a declaratory judgment that its lease and

permit practices did not violate the "public park" and anti-alienation conditions in the patent. In the alternative, Idaho sought a declaration either that its decision not to renew leases and permits constituted compliance with the Department of Interior's request so as to avoid forfeiture, or that granting one-year leases would comply with the patent. On September 7, 1977 the United States filed a complaint claiming the practices violate the conditions in the patent and seeking to quiet title to the property. The suits were consolidated for trial and the court granted the Tribe and the Heyburn State Park Leaseholders Association (Leaseholders) limited leave to intervene.

On November 9, 1979, the district court granted Idaho's motion for summary judgment, concluding on the basis of its findings of undisputed facts that Idaho had not violated the conditions in the patent. Both the United States and the Tribe appealed, but before oral argument the United States moved to voluntarily dismiss its appeal, and a panel of this court granted the motion. With only the Tribe remaining, Idaho moved to dismiss the appeal on the ground that no case or controversy existed because any property interest flowed solely to the United States. We remanded to the district court for a determination of whether the Tribe possessed a beneficial interest in the power of termination.

On remand, the district court held that the Tribe does not have a beneficial interest in the power of termination. The Tribe appealed, and we reverse. While we held that the Tribe does have such a beneficial interest, we remanded for further proceedings including a determination of the nature and extent of that interest. *Idaho v. Andrus*, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984). On this second remand, the district court held, by memorandum

dated August 9, 1984, that under the 1911 patent only the United States, and not the Tribe, could exercise the power of termination. The court also concluded that the United States, by virtue of its withdrawal from the litigation, had manifested an intent not to exercise the power of termination. The Tribe appeals.

Therefore, two decisions below are before us: first, the district court's 1979 grant of summary judgment in favor of Idaho, and second, the court's 1984 decision holding that the Tribe may not exercise the power of termination contained in the patent.

II. THE TRIBE'S RIGHT TO MAINTAIN THIS APPEAL

We have already decided that the Tribe has standing to pursue this appeal despite the withdrawal of the United States. *Idaho v. Andus*, 720 F.2d at 1469-70 (1984).[2] Idaho and the Leaseholders argue, however, that the district court correctly held that the Tribe may nevertheless not exercise the power of termination provided for in the patent, and that the United States did not exercise that power. We conclude that forfeiture is inappropriate; however, we base our decision on the grounds different that those relied on by the district court.[3]

III. STANDARD OF REVIEW

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment in favor of Idaho and its denial of the Tribe's summary judgment motion *de novo*. *E.g.*, *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986); *Lojek v. Thomas*, 716 F.2d

675, 677 (9th Cir. 1983). Viewing all the evidence in the record in the light most favorable to the non-moving party, we must determine whether there is a genuine issue as to any material fact and, if not, whether the substantive law was correctly applied. *E.g., International Union of Bricklayers Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985); *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984).

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[1]The cottage site leases executed before 1972 provided no express right of access to the public. Those leases executed after 1972 allowed the public the right of ingress and egress to the adjoining beach.

[2]In this opinion we held that the Act of 1906 created a beneficial interest in the Tribe and that the Act of 1908 did not evince a clear congressional intent to extinguish that beneficial interest. Idaho now argues that our holding should be reconsidered in light of an intervening United States Supreme Court decision, *Solem v. Bartlett*, 465 U.S. 463 (1984), which, it contends, clearly indicates that the establishment of Heyburn State Park diminished the Tribe's reservation. But *Solem* dealt only with *diminishment* of Indian land, which, as we pointed out in our previous decision, is a question that is distinct from the one presented here, that of *extinguishment* of rights. *See Idaho v. Andrus*, 720 F.2d at 1464-65 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 601 n.24 (1977); *Swimm v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983)). Congress may diminish Indian land without extinguishing title to the land. *See Idaho v. Andurs*, 720 F.2d at 1464-65; *see also United States ex rel. Hualpai Indians v. Santa Fe Pacific R.R.*, 314 U.S. 339, 354 (1941) (cautioning against implying extinguishment); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986) (same). Because *Solem* does not address the propert analysis of a claim of extinguishment, we do not find it necessary to reconsider our previous decision.

[3]We also point out that a power of termination clearly may be exercised by filing suit, as the United States did here. *See, e.g.*, 1 *American Law of Property* §4.9 (1952) ("[t]oday by the weight of authority . . . an action by the conveyor to recover the possession . . . constitutes the election to forfeit" (footnote omitted)); 4A *Thompson on Real Property* §1979, at 389-91; 1981, at 409 (1979 Replacement) ("a suit for the possession of the land . . . is equivalent to a re-entry" (footnote ommitted)). In fact, it may be that the United States can only exercise a power of termination by filing suit. *See New York Indians v. United States*, 170 U.S. 1, 24-25 (1898).

IV. FORFEITURE

A. RULES OF CONSTRUCTION

The district court granted summary judgment to Idaho, concluding that its lease and permit practices did not violate the patent's forfeiture provision. In order to determine whether summary judgment was appropriate, it is important to understand the rules by which the forfeiture provision in the patent must be construed. *Cf. Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986) (on motion for summary judgment, evidence must be considered in light of substantive evidentiary burden).

1. Forfeiture provisions are not favored in the law, *e.g.*, *Humphrey v. C. G. Jung Educational Center*, 714 F.2d 477, 480-81 (5th Cir. 1983) (Texas law); *Bornholdt v. Southern Pacific Co.*, 327 F.2d 18, 20 (9th Cir. 1964) (California law, "general legislative and judicial hostility to divesture of properties long held by grantees" (footnote omitted)); *Schlegel v. Hansen*, 570 P.2d 292, 293 (Idaho 1977). Such provisions are construed liberally in favor of the holder of the estate, and a construction which avoids forfeiture must be adopted if at all possible. *See Humphrey*, 714 F.2d at 480-81; *Bornholdt*, 327 F.2d at 20; Schlegel, 570 P.2d at 293. These rules have been applied to attempts by the United States to enforce a forfeiture provision in a grant of public land, *see Oregon & California Railroad v. United States*, 238 U.S. 393, 420 (1915) ("it is a general principle that a court of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture"); *New York Indians v. United States*, 170 U.S. 1, 25-26 (1898) ("A condition, when relied upon to work a forfeiture, is construed with great strictness . . . [A]ny ambiguity in [the grantor's] deed

or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee."),[4] and to an attempt by Indians to recover former Indian land conveyed to a county by United States patent on condition that the land be used for cemetery purposes only, *see Choctaw and Chickasaw Nations v. Board of County Commissioners*, 361 F.2d 932, 934 (10th Cir. 1966) (Oklahoma law). Even a breach of a condition may not result in forfeiture if the grantee has "substantially complied" with the terms of the conveyance. *See Bornholdt*, 327 F.2d at 20-21.

2. The construction of a federal patent is governed by federal law, *e.g.*, *United States v. Oregon*, 295 U.S. 1, 28 (1935), and if federal law is silent Congress is presumed to have intended the conveyance to be construed according to the law of the state in which the land lies, unless a contrary congressional intent is shown, *e.g.*, *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922) (involving disposal of Indian lands under guardianship of United States). Here, there is no indication as to Congress's intent regarding the appropriate law to apply. Accordingly, where federal law is of no avail we are guided by Idaho law.

3. Idaho law governing the construction of deeds dictates that a court interpreting a deed should be guided by the intention of the parties, in this case the United States and the State of Idaho. *Gardner v. Fliegel*, 450 P.2d 990 (Idaho 1969). The intention of the parties is to be gleaned from the instrument itself, if possible. However, if the language in the deed is ambiguous, the intention must be determined from extrinsic evidence. *Id.* at 994; *Hogan v. Blakney*, 251 P.2d 209, 213 (Idaho 1952); *McLean v. Row*,

57 P.2d 689, 691 (Idaho 1936).

4. Accordingly, in construing the phrase "to be . . . held, used, and maintained solely as a *public park*" we must attempt to give effect to the intent of the United States, as expressed by Congress. *E.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Where, as here, Congress has left a term undefined, it is presumed that the words were used in their ordinary, commonly understood meaning. *E.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") *see also*, *e.g.*, *City of Lewiston v. Mathewson*, 303 P.2d 680, 684 (Idaho 1956). Since the term "public park" is subject to a host of various interpretations it is appropriate in this endeavor to look to extrinsic evidence relevant to the meaning of the phrase "public park," *see*, *e.g.*, *Leary v. United States*, 395 U.S. 6, 37-39 (1967), including evidence of the circumstances prevailing at the time of enactment, *see*, *e.g.*, *United States v. Wise*, 370 U.S. 405, 411 (1962); *Burlington Northern Railroad v. Department of Public Service Regulation*, 763 F.2d 1106, 1111 n.3 (9th Cir. 1985). Keeping these principles in mind, we must determine whether, in light of all the uncontroverted facts, the district court properly held that Idaho is not required to forfeit the Heyburn State Park land.[5]

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[4]In *New York Indians*, land was granted to Indians by a treaty that contained a forfeiture provision. The case might therefore be explained on the ground that treaties with Indians are to be liberally construed in favor of the Indians. *See*, *e.g.*, *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975). If this were the case, the principle followed in *New York Indians* might be inapplicable to the present case because the grantee here is the state of Idaho, not an Indian tribe. Likewise, the discussion in

Oregon & Cal. RR. might be explained on the basis that railroads are accorded more favorable treatment than other grantees of public lands. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979). However, in neither opinion does the Court indicate that its adherence to the general rule requiring strict construction of forfeiture provisions is dependent on or related to the fact that the grantees were Indians or a railroad; the Court's only citation in each case is to a property law text. *See Oregon & Cal. R.R.*, 238 U.S. at 420; *New York Indians*, 170 U.S. at 25-26.

[5]The Tribe contends that the 1911 patent must be construed in favor of the Tribe by virtue of the general rule that ambiguities in treaties and agreements with Indians, and statutes ratifying the same, "are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." *Antoine, supra* note 3, 420 U.S. at 200 (quoting *Choate v. Trapp* 224 U.S. 665, 675 (1912)) This canon of construction recognizes the United States' "presumptively superior negotiating skills and superior knowledge of the language," and prevents the government from taking unfair advantage of this unequal bargaining position. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 675-76 (1979); *see also* F. Cohen, *Handbook of Federal Indian Law* 222 (1982 ed.). However, this rationale does not apply to this case; the patent involves an agreement between the United States and Idaho, not between the Tribe and the United States (or any other party).

---

[6]We are not restricted to those facts relied upon by the district court, but must consider the grant of summary judgment on the basis of all facts in the record before us. Nor are we limited to the grounds on which the district court's decision was based. *See Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980) (appellate court may uphold summary judgment on ground not considered by trial court).

B. THE "PUBLIC PARK" PROVISION

A "public park" is necessarily meant for the use and enjoyment of the public. *See, e.g., The Random House Dictionary (Unabridged)* 1049 (1979) ("park" is "an area of land . . . for the enjoyment of the public"); 67A C.J.S. *Park* at 604-05 (1978) ("There is general agreement that a park is a place for the resort of the public. Accordingly, a park

must be for the benefit of the public at large and open for use use and enjoyment of everyone . . ." (footnote omitted)); 59 Am. Jur. 2d *Parks, Squares, and Playgrounds* §1 (1971) (" 'park,' as now commonly understood in this country, means a piece of ground . . . for the resort of the public"). This notion, however, is inherently broad and flexible.

Idaho argues that leasing portions of a park to private individuals for the maintenance of cottages makes the leased portions available for the use of the public because those who lease the sites are members of the public. This interpretation of the word "public" is, to put it mildly, disingenuous. Everyone is a member of the public. Idaho's theory would make *any* use of the park a "public" use. For example, under Idaho's approach, the state could execute 99-year leases of 100-acres cottage sites covering all of the park. Clearly such a practice would not be consistent with the requirement in the patent. The practices at issue here are not as demonstrably violative of the patent as those in our example; nevertheless, the mere fact that members of the public lease park land does not demonstrate that Idaho's leasing practices constitute proper park uses.

5. As we have emphasized *supra*, forfeiture provisions are to be construed so as to avoid forfeiture if at all possible. Idaho is required to forfeit the land only if its leasing practices are *clearly* not proper "public park" uses. If there is a legitimate question as to whether those practices violate the patent, forfeiture is barred. In short, summary judgment in favor of Idaho was proper if the uncontroverted evidence in the record, taken as a whole,[6] precludes a determination that the leasing practices constitute a clear and unambiguous violation of the "public park" condition of the patent. *Cf. Anderson*, 106 S.Ct. at 2513 (in libel action,

court considering motion for summary judgment must be guided by "clear and convincing" evidence standard applicable in libel cases).

6. We find historical evidence of park uses helpful in determining whether Idaho's leasing practices *clearly* constitute improper public park uses. The uncontroverted evidence in the record shows the following: by 1928, at least seven states leased summer homes in their state parks. Pennsylvania had, by 1925, leased over 1,200 sites. Mackinac Island State Park, formerly a national park in which summer cottage leasing was permitted, was patented to Michigan in 1895 with conditions similar to those considered in the present case, and renewable, 21-year summer cottage site leases have been issued up to the present day. The superintendent of the park has stated his opinion that such leasing historically has been considered a proper use of a park for public purposes. Four additional states currently lease summer cottage sites, some of which were planned by the National Park Service.

7. There also is undisputed evidence of cottage leasing in the early 1900's in the national parks. In Glacier National Park, established in 1908 by the same Congress that authorized the Secretary of the Interior to convey the land involved in the instant case to Idaho for use as a public park, leasing of sites of up to 20 years was authorized by statute. Leasing was also authorized in Lassen Volcanic National Park, which was established in 1916, and by 1920 when Idaho began its leasing progam in Heyburn State Park, 1,600 leases had been executed. The United States Forest Service has in the past leased sites on its lands, including sites in Idaho around 1920. Additionally, the federal government permits permanent private landholdings

in the national parks. For example, in Yosemite National Park there are approximately 200 acres of privately owned land. The private tracts of land contain permanent houses, seasonal residences, mobile homes, rental cabins, a hotel, grocery store and a gas station. J. Lambert, *Private Landholdings in the National Parks: Examples From Yosemite National Park and Indian Dunes National Lakeshore*, 6 Harv. Envtl. L. Rev. 35, 41 (1982). Private landowners in the Indian Dunes National Lakeshore may sell their land to the federal government and obtain a twenty-five year leaseback. J. Lambert, *supra* at 51. Thus, the federal government tolerates permanent private inholdings in the national parks and encourages leasebacks for those landowners willing to sell their property to the government.

8. The record also shows that leasing of sites in both Glacier National Park and Lassen Volcanic National Park has been prohibited since 1931. *See* 16 U.S.C. §§162a, 202a (1982). Beginning in the 1950's and 1960's, the federal government departed from its policy of leasing sites on its lands, including Forest Service lands. Now, the Forest Service's goal is to eliminate leaseholds on virtually all its lands. However, this shift in the federal government's leasing policy does not mean that the terms of the original act of 1908 also shift or change over time in such a way as to mirror current notions concerning the proper use of public parks. The words of an instrument are to be given meaning that they were given when the instrument was executed.

9. Courts which have been called on to construe ambiguous passages in federal patents have limited their analysis to ascertaining what Congress originally intended in the grant. *See Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co.*, 97 U.S. 491, 497 (1878) (land grants

to railroad companies intended by Congress to aid in construction of railroads); *Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979) (intent of Congress in 1862 when it granted railroad companies odd-numbered sections of land on both sides of proposed railroads "was to 'open up' the West and develop it"); *Macdonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941) (congressional policy underlying 1875 land grant was "to promote settlement and to enhance the value of the public domain"), *modified*, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). Employing the principles articulated in the above cases, our task is to discern congressional intent in 1908. In light of the prevalence of cottage leasing in national as well as state parks in the early 1900's, it is obvious that Congress did not intend to prohibit the practice. If Congress had wished to prohibit such a widely-accepted practice, it certainly would have done so expressly in the Act of 1908.

10. The evidence that leasing practices historically were considered to be proper park uses is sufficient to preclude a holding that Idaho had *clearly* violated the "public park" restriction. Because Idaho's practices comport with a historical notion of proper park use, we hold that forfeiture is not an appropriate remedy in this case.

11. We also note that the State of Idaho must have the authority to administer and operate its state parks. Federal courts should not interfere with a state's administration of its parks unless it is necessary to protect an important federal right. The Idaho legislature has delegated the power to operate, maintain and develop state parks to the Idaho department of parks and recreation. Idaho Code §67-4219. Pursuant to this delegation of authority, the park and rec-

reation board exercises vast powers in its administration of the Idaho state park system. Idaho Code §67-4223. the park and recreation board is vested with the authority to lease park land in all Idaho state parks, Idaho Code §67-4223 (g) (1986 Supp.), and specifically in Heyburn State Park, Idaho Code §67-4204. This court must defer to the board's leasing policy unless the policy substantially infringes on an important federal right. Absent such deference the federal courts will become embroiled in the day-to-day operation of state parks.

12. State courts have traditionally deferred to the discretion of city park commissioners in the administration of public parks. These courts have condoned many different private, and quasi-private, uses of public park land. For instance, city park administrators may set aside public park land for recreational or athletic purposes. *Shields v. City of Philadelphia*, 405 Pa. 600, 176 A.2d 697 (1962) (public park land may be set aside for use as a little league baseball diamond); *Summit County Historical Society v. City of Akron*, 115 Ohio App. into ice rink); *Aquamsi Land Co. v. City of Cape Girardeau*, 346 Mo. 524, 142, S.W.2d 332 (1940) (construction of stadium, race track and athletic fields permitted on park land). The courts have approved using park land to provide temporary housing during emergencies, *Hyland v. City of Eugene*, 179 Ore. 567, 173 P.2d 464 (1946) (veterans may reside in trailer homes in park for two years during temporary housing shortage following World War II), and leasing subsurface rights for the purpose of constructing a parking garage. *City and County of San Francisco v. Linares*, 16 Cal. 2d 441, 106 P.2d 369 (1940) (parking garage built under Union Square). Courts have also held that long term leases to operate hotels or

restaurants are consistent with a "public park" restriction. *795 Fifth Avenue Corp. v. City of New York*, 13 A.D.2d 733, 215 N.Y.S.2d 391 (1961); *Harter v. City of San Jose*, 141 Cal. 659, 75 P. 344 (1904). Thus, the courts will typically defer to the park commission's judgment governing the allocation of park resources and use of park land. We find these cases persuasive. In this case we cannot conclude that the Idaho park and recreation board exceeded its ample authority through its leasing practices. Moreover, we emphasize that only one-third of one percent of the land in Heyburn State Park is subject to the lease restrictions at issue in this action. A court must refrain from finding a violation of a "public park" restriction when only a small segment of land in the park is affected. *Angel v. City of Newport*, 109 R.I. 588, 288 A.2d 498 (1972); *Nichols v. City of Rock Island*, 3 Ill. 2d 531, 121 N.E.2d 799 (1954). To justify forfeiture, there must be a substantial deviation from commonly accepted forms of public usage. Here, 99.67% of the land in Heyburn State Park is unencumbered by the contested leases. It is not essential that the public have unrestrained access to every square foot of land within a park to make it "public." Consequently, we hold that, given the small size of the area where leases are allowed, the Idaho park and recreation board had not exceeded the scope of its authority to administer and operate Heyburn State Park.

V. THE ANTI-ALIENATION PROVISION

13. The Tribe also requests forfeiture on the ground that Idaho's practice of leasing cottage sites constitutes an alienation of the land in violation of the patent.[7] We must apply the same rule here that we applied to the "public park" provision — we must construe "alienation" so as to

avoid a forfeiture if possible, and if there is doubt whether the term includes a particular transfer of an interest we must construe the provision against the party seeking forfeiture. While there is some authority for the proposition that leasing may be considered an alienation of land,[8] the more commonly understood meaning of the word is that an alienation is a complete transfer of title rather than a transfer of a leasehold interest.[9] *Sec. e.g., Properties Investment Enterprises v. Foundation for Airborne Relief, Inc.*, 563 P.2d 307, 309 (Ariz. Ct. App. 1977)

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[7]It is well-settled that unqualified restraints on alienation are generally invalid. *See e.g.*, Idaho Code § 55-111 (1979) (originally R.S. § 2836) (Prohibiting unqualified restriction on alienation of real property "by any limitation or condition whatever"); 5A Powell, *The Law of Real Property* ¶ 840 (1985) ("Any provision which, without qualifications, undertakes to deny the conveyee of a legal estate in fee simple power to alienate his acquired estate is invalid." (footnote omitted)). Ordinary rules of property law should not, however, be allowed to thwart the clear intent of Congress, *see, e.g., Missouri, Kansas, and Texas Ry.*, 97 U.S. at 497, and Congress by the 1911 patent prohibited alienation of the Heyburn Park land. Moreover, courts are somewhat more willing than usual to uphold a restraint on alienation when contained in a grant of land for public use. *See, e.g., Smedley v. City of Waldron*, 739 F.2d 399, 400-01 (8th Cir. 1984) (per curiam) (Arkansas law). However, even if the anti-alienation provision in this case is valid, it must be construed narrowly for purposes of a forfeiture proceeding.

[8]For example, according to Professor Powell, provisions in conveyances prohibiting the leasing of the conveyed premises are often regarded as "restraints on alienation," *see* 5A Powell, *The Law of Real Property* ¶ 842 at 77-13 n.l, 77-17; thus, it appears that "alienation" is a general category which *may* include leasing.

The Tribe relies on the statement in 5 *Thompson on Real Property* § 2395 at 193 (1979 Replacement) that "'alienation' embraces every mode of passing real estate by act of the parties, as distinguished from passing it by operation of law." This passage, however, is contained in a discussion of the various means by which *title* to property may be

passed. Thus, read in context, the quotation explains only that "alienation" refers to passage of title by act of the parties as opposed to by operation of law.

[9]Idaho has at all relevant times retained title to the land in question.

("[a]n alienation is a complete, voluntary transfer of title"); 3 C.J.S. *Alienate* at 771 (1973) ("The term 'alienate' has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate."); *id. Alienation* at 772 ("As a general rule [alienation] excludes any transfer short of the conveyance of the title . . . ." (footnote omitted)). Accordingly, we hold that Idaho's leasing practices do not constitute "alienation" of the land for purposes of forfeiture under the patent.[10]

The judgment of the district court is **AFFIRMED.**

REINHARDT, Circuit Judge, concurring the dissenting:

While I concur in the conclusion of the majority that the Coeur d'Alene Tribe is not entitled to forfeiture, I disagree strongly with part of the analysis it uses in reaching that conclusion. I also disagree strongly with the majority's suggestions that we should defer automatically to the State of Idaho's interpretation of the term "public park" and that Idaho's Heyburn State Park leasing practice falls within the meaning of that term. I do not believe that

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[10]This interpretation is also the one that was consistently placed on the word "alienation" in the homestead laws at the time the patent was issued in 1911. *See, e.g., Stark v. Morgan*, 85 P. 567 (Kan. 1906) (mortgage not "alienation" because did not pass title). In *Boulton v. Telfer*, 12 P.2d 767 (Idaho 1932), the Supreme Court of Idaho construed

a provision in the federal homestead laws prohibiting alienation of land by homestead entrants for a certain period following entry. The homesteader had leased part of his land for grazing. The court concluded that such leasing did not constitute "alienation": "Alienation within the meaning and spirit of said sections [of the Homestead Act] must affect the title or be such a conveyance of such a qualified interest as might become absolute on patent passing from the United States." *Id.* at 770. Although the interpretation of "alienation" in the homestead laws is not necessarily controlling here, we believe it is nevertheless relevant to our effort to determine Congress's intent when it withdrew the Heyburn Park land from homestead entry and transferred it to Idaho with an unqualified prohibition on "alienation."

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leasing prime public land to those who can afford to maintain lakeside summer cottages, and excluding the general public from that portion of the park, complies with the congressional mandate we are obligated to enforce.

The basis of the majority's holding with respect to forfeiture, as I understand it, is that forfeiture is appropriate only if we find that Idaho has *clearly and unambiguously* violated the public park restriction, and that the historical pattern of park leasing in the earlier periods of our country's development precludes such a finding, at least without prior notice or court ruling. With this much of the majority's opinion I concur; however, I do not agree with the portion of the forfeiture analysis in which the majority states that we should construe the term "public park" according to its meaning at the time Congress used the term in 1908. I believe that the interpretation of a term used in an act of Congress concerning a grant of federal land requires us to apply modern day notions of proper public park uses.

Beyond the forfeiture issue, the majority appears to decide that Idaho's leasing program constitutes a proper

public park use because it is analogous to park uses that have been upheld by other courts, and because, in any case, we should not interfere in the administration of state parks. However, none of the cases that the majority attempts to analogize to the case before us condones the denial of public access to park property so that private individuals may enjoy the exclusive use of such property. Further, the majority's invocation of the shibboleth that the federal judiciary should abdicate its duties rather then interfere with state administrative functions makes absolutely no sense in the context of interpreting a document that conveys realty between two parties, one of which happens to be a state.

Accordingly, while I agree that forfeiture is not appropriate, unlike the majority I conclude that the leasing practice complained of here does not constitute a "public park" use and is contrary to the provision of the federal land patent. I would therefore afford the Tribe declaratory or injunctive relief.

A. CONTEMPORARY NOTIONS OF "PUBLIC PARK" SHOULD BE EMPLOYED IN DETERMINING CONGRESS' INTENT.

The majority and I agree that in interpreting the meaning of the term "public park" the intent of Congress is controlling. However, I do not agree that the meaning of the term was immutably fixed in 1908 and that we should ignore its contemporary meaning.[1]

In assessing what Congress meant when it used a general term such as "public park" in one of its enactments, the statutory language should be construed broadly so as to reflect changing circumstances — not narrowly so as to

limit its meaning to the applications specifically contemplated at the time of enactment. *See, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("This Court frequently has observed that a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" (quoting *Barr v. United States*, 324 U.S. 83, 90 (1945) and citing *Browder v. United States*, 312 U.S. 335, 339-40 (1941); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937))); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 397-400 (1966); *see also West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1101-02 (9th Cir. 1983); *In re Persico*, 522 F2d 41, 64-66 (2d Cir. 1975); *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); *University of Tex. Med. Branch at Galveston v. United States*, 557 F.2d 438, 455 (5th Cir. 1977). This is particularly true where the language is embodied in a document that is not subject to

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[1]The majority's insistence on giving the term "public park" the meaning it had in 1908 does not affect the outcome of the forfeiture question; it does, however dictate the majority's additional and erroneous conclusion that Idaho's leasing practice does not violate the patent.

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amendment in the future and so must incorporate a meaning broad enough to encompass new and different circumstances.

As Justice Frankfurter aptly described it, "[a]n enactment is an organism in its environment. And the environment is not merely the immediate political or social context in which it is to be placed . . . ." *Foreword to Symposium on Statutory Construction*, 3 Vand L. Rev. 365, 367 (1950). The

Second Circuit has stated that a court interpreting a statute "must ask itself not only what the legislature means abstractly, or even on the basis of the legislative history, but also what it ought to mean in terms of the needs and goals of our present day society." *In re Persico*, 5422 F.2d 41, 65 (2d Cir. 1975) (quoting Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950). One of our judicial functions is to read legislative enactments so as to give them meanings that make sense not only at the time of their passage but also in the future.

Construing a statute in light of subsequent events is fully consistent with our obligation to carry out Congress' intent at the time of enactment. Sometimes Congress utilizes a general rather than a specific term because it wishes to let the courts flesh out certain complex aspects of a statute on a case-by-case basis. Other times, being unable to anticipate the specifics of future developments, whether scientific, cultural or otherwise, Congress uses a general term, knowing that its meaning will change in some respect and intending that courts will apply that changed meaning. In both instances, we perform our task of interpreting the statute in light of its overall legislative purpose. Our responsibility was well summarized by Judge Learned Hand:

> [L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols . . . . We can best reach the [statute's] meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons actuated by such a purpose, would have dealt with it, if it had been presented to them at the time.

Borrela v. Borden Co., 145 F.2d 63, 64 (2d Cir. 1944), *aff'd*, 325 U.S. 679 (1945). The Second Circuit further described our role by adopting the analysis offered by Professor Llewellyn:

> Increasingly as a statute gains in age . . . its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be put in it, but rather for the sense which can be quarried out of it in the light of the new situation.

In re Persico, 522 F.2d at 65 (quoting *Remarks on the Theory of Appellate Decision and the Rules or Canons About How States Are To Be Construed*, 3 Vand L. Rev. 395, 400 (1950)).

Interpreting a statute "in light of the new situation" is not always the appropriate method for determing congressional intent. We must recognize the importance of Congress' authority to amend statutes and must be careful not to encroach on its jurisdiction. For example, where a statute concerns a complex, substantially codified body of law, the intentions of Congress are best served by leaving problems created by changed circumstances to the amendatory process. *See, e.g., West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1102 (9th Cir. 1983) ("the judiciary is not the proper branch of government to update complex statutes when legislative decisionmaking is necessary"). However, there the act in question is not of that type. It does not set forth an intricate legislative scheme requiring careful congressional balancing before changes can be made. In

fact, because the Act of 1908 provides for the issuance of a federal land patent, once the patent issues, congress is precluded from enacting amendments. Where Congress has but one opportunity to legislate in an area that will affect future generations, it must utilize the terms that are sufficiently flexible or adaptable to apply to circumstances beyond its immediate contemplation. Unless there is a clear indication of a contrary congressional will, we should interpret those terms in light of modern conditions.

The majority agrees that the concept of public park use is "inherently broad and flexible" and is "subject to a host of various interpretations." Majority opinion, slip op. at 13, 12. It is clear that our understanding of what constitutes a proper park use has changed over time and with varying conditions. *See, e.g., 705 Fifth Ave. Corp. v. City of New York*, 242 N.Y.S 2d 961, 971 (N.Y. Sup. Ct. 1963) ("[a]s times change, park uses change"), *aff'd*, 257 N.Y.S. 2d 921 (N.Y. 1965); 59 Am Jur. 2d *Parks, Squares & Playgrounds* § (1971) (noting how historical notion of "park" has changed); 67A C.J.S. *Park* at 604 (1978) (same). I believe that Congress utilized the term "public park" understanding that its meaning would change with time and circumstances and intending that the Act of 1908 and the patent issued thereunder would be construed in light of those changing circumstances; specifically, I think it apparent that Congress intended Idaho's use of the land to conform at all times to the current meaning of the term "public park."

The majority evidently disagrees with my analysis and cites two cases involving federal land patents in which the Supreme Court limited its discussion of congressional intent to what Congress originally intended. Majority opinion, slip

op. at 16; *Missouri, K. & T. Ry. v. Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878) (involving question whether Congress had made a present or future grant); *Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979) (involving question whether congressional grant contained, in absence of express reservation of easement, an implied one). In those cases, however, there was no suggestion that a term's meaning had in any way changed or evolved since the date of its inclusion in a bill. Thus, there was no reason to consider whether Congress, in using a general term the meaning of which changes over time, intended that it would be construed in light of society's changed understanding.

In the case before us, Congress' purpose was to insure that the Heyburn tract would be preserved for the public's continuing enjoyment.[2] To define the term public park solely in terms of its meaning at the time of passage of the Act of 1908 would serve to limit the public's use of park lands and thus to frustrate, not further, the intent of Congress.

B. IDAHO'S LEASING PRACTICE DOES NOT CONSTITUTE A PROPER PUBLIC PARK USE.

Although the lack of certainty in the terms of the patent makes forfeiture an inappropriate remedy, that does not mean that Idaho's leasing program complies with those terms. A wholly different presumption applies where the issue is whether Idaho is in breach — a presumption that strongly supports the Tribe's position. Contrary to the majority's view, I would hold that the state's leasing practice constitutes the privatizing of public lands and violates

[2]Congress, as well as the State of Idaho and the Tribe, was also concerned about the immediate threat that the tract might be acquired by commercial logging interests. *See State of Idaho v. Andrus*, 556 F. Supp 15, 18 n.1 (D. Idaho 1982), *set aside on other grounds*, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984). Idaho's Senator Heyburn, for whom the park was named, originally introduced legislation to make the property a national park. *See 720* F.2d at 1467 & n.1. Congress was reluctant to do so because of its concern over the need to provide continuing federal funding for operating purposes. *See* 556 F. Supp. at 18. Granting the land to Idaho for a state park served to guarantee the public's unfettered enjoyment of the tract and to eliminate the need to provide continuing federal funding.

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the patent's requirement that the lands are to be "held, used, and maintained solely as a public park."

Forfeiture is but one of the remedies for violation of a patent. Conditions in federal land grants are enforceable by injunction even where there is no express provision to that effect. *See Oregon & Cal. R.R. v. United States*, 238 U.S. 393, 421-22 (1915). If Idaho's leasing program does not constitute a proper "public park" use, it would be appropriate to enjoin the practice as inconsistent with the patent, or to afford the Tribe declaratory relief.

Where relief other than forfeiture is sought, the general requirement that a term be construed strictly against the party seeking relief does not apply. *See, e.g., Humphrey v. C.G. Jung Educ. Ctr.*, 714 F.2d 477, 480 (5th Cir. 1983) (discussing distinction between covenants and forfeitures provisions, and the law's preference for the former). Instead, and in sharp contrast to the rule regarding construction of forfeiture provisions, the applicable rule is that federal land grants are to be construed favorably to the federal government. *See e.g., United States v. Union Pac.*

R.R., 353 U.S. 112, 116 (1957); *Southern Idaho Conf. Ass'n of Seventh Day Adventists v. United States*, 418 F.2d 411, 415 n.8 (9th Cir. 1969). Nothing passes except what is conveyed by clear language; ambiguities are to be resolved against the grantee. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *Union Pac. R.R.*, 353 U.S. at 116; *Humboldt County v. United States*, 684 F.2d 1276, 1280 (9th Cir. 1982). Under this standard, we must hold that Idaho's leasing practice violates the "public park" restriction unless the record reflects that it *clearly and unambiguously* constitutes a proper park use. In light of the federal government's current policy against leasing of public park lands, we could not reasonably so construe the record.

The record shows that at the beginning of this century demand for recreation was low and it was necessary to use various techniques to encourage people to visit parks. Leasing portions of park lands to private persons was one such technique. The practice had little if any adverse effect on the public since there was more than enough land to satisfy the needs of all those wishing to make use of the parks. It was during that earlier era that the federal government permitted private leases of public park lands. It appears that one reason for Idaho's adopting the leasing program when Heyburn State Park was established was to increase park use.

The record also shows unequivocally, however, that since the time the Heyburn leasing program was first put in effect, there have been significant changes in park uses and practices. Demand for park facilities is now very high; there is no longer a need to encourage the public to use public parks by offering long-term private leases of park land. Moreover, removing selected parts of Heyburn Park from

public use currently has an adverse general impact, since the public would make use of that land if permitted to do so. The modern view is most clearly reflected in the federal government's present policy of eliminating virtually all leasing of federal park and forest lands. *See* majority opinion, slip op. at 15. As the majority notes, while leasing was once sanctioned by statute in Glacier National Park and Lassen Volcanic National Park, the statutes have been amended and now expressly prohibit that practice. *Id; see* 16 U.S.C. §§ 162a, 202a (1982).[3]

The contemporary decisions of state courts also reflect a more egalitarian view of the proper use of public parks than prevailed in the 1800s. Modern state courts generally recognize that the essential feature of a *public* use is that it not be confined to wealthy or privileged individuals but be

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[3]Professor David Towne, Idaho's expert witness, testified without contradiction that since the 1950s or 1960s the federal government's policy has been to proscribe leasing of public park land, and that this change in attitude toward proper park use is directly attributable to the greater use of parks by the public.

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available to all. *See, e.g., L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 290 (tex. 1950) (public use concerns the general public "'as distinguished from particular individuals or estates.'" (quoting 50 C.J. *Public* § 94 at 864 (1930))); 73 C.J.S. *Public* at 337 (1983) (Same); *see also, e.g. Garland v. Clark*, 88 So.2d 367, 370 (Ala. 1956) ("'the essence of a dedication to the public uses is that it shall be for the use of the public at large . . . and not for any particular part of it'" (quoting 16 Am. Jr. *Dedication* § 15 at 359 (1938)));

Allen v. Village of Savage, 112 N.W.2d 807, 813 (Minn. 1961) (public dedication may not be devoted to private use). Simply put, the contemporary definition of a public park is a trace of land that is open to all members of the public for active or passive recreational use.

Under present day circumstances, I fail to see how Idaho's leasing practice can be said to meet the condition of the land patent requiring that the Heyburn tract be devoted solely to use as a public park. Idaho grants to private parties affluent enough to afford the privilege the exclusive long-term use and possession of prime lakefront areas of the park for the construction and maintenance of private summer homes. This practice clearly restricts the use by the public of those portions of the park.[4]

I do not mean to suggest that the granting of *any*

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[4]Ironically, the results of this practice appear not to be particularly salutary in other ways as well. The 1975 Annual Report on Heyburn State Park, prepared by Heyburn State Park Manager Bryan Rowder, states:

> Cabin areas are overused and cluttered looking because of closeness. The cabin area gives a feeling that you are in a crowded resort town, rather than a park . . . . The cabins gradually are becoming permanent residences, resulting in the urbanization of Heyburn State Park. Some cabin owners seem to think we are their city employees, who are suppose to take care of the trees around their lots, keep their driveways in good condition, plow snow so they can all get to work easy [sic] without buying snow tires or chains, guard their private property against theft and vandalism, etc.

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temporary right to the exclusive use of park land would necessarily result in an improper "public park" use. For

example, issuing permits for overnight camping at designated sites clearly constitutes an appropriate park use even though such permits restrict the use of portions of the park for a specific period of time. I do not believe that we need to decide at what point the duration (or some other characteristic) of a permit for temporary use of park land renders a particular use improper. *Cf. Hyland v. City of Eugene*, 179 Ore. 567, 173 P.2d 464 (1946) (en banc) (providing temporary housing for war veterans during extreme housing shortage after World War II was a permissible park use). Whatever the dividing line, I certainly have no difficulty in concluding that awarding ten-year exclusive leaseholds in prime lakefront property to individuals so that they may maintain private summer cottages on public land is an impermissible "public park" use.

C. THE MAJORITY'S DEFERENCE TO STATE PARK ADMINISTRATORS IS IMPROPER AND UNSUPPORTED.

The majority appears to say that federal courts should abstain from examining any decision made by state officials relative to any activity in a state park no matter in what context the issue arises. Majority opinion, slip op. at 16. The majority even proffers a new standard without citation or support — we must always defer to the administrative whim of state park techno-bureaucrats unless the policy at issue "substantially infringes on an important federal right." *Id.* In its enthusiasm for abdicating judicial responsibility, the majority offers (1) and incantation of what is rapidly becoming ritualistic dogma — federal courts should not act because they will become embroiled in day-to-day operations that are best left to the states, (2) several examples of cases in which state courts have upheld decisions of public

officials with respect to park uses, and (3) the fact that the cottage leases take up only one-third of one percent of the total area of Heyburn State Park. Each of these purported justifications is wholly without merit.

First, the fear that we will become bogged down in the complex and mysterious issues that state park administrators face daily is simply irrelevant to the issue before us. We are asked to interpret a term that appears in an act of Congress and in a federal document conveying land. We must determine whether the patentee's actions violate a condition imposed by Congress restricting the use of that land. That the patentee is a state is of no consequence. The task is one to which we are well suited; it is also one that we have an obligation to perform. Under the majority's logic, whenever a state is a party to a conveyance and the interpretation of the conveying document requires an analysis of the actions of state officials, we must always presume those actions comport with the terms of the conveyance and then resolve the matter in favor of the state. Put another way, even though the conveying party is the federal government, represented by the Secretary of the Interior acting pursuant to congressional mandate, the majority would have federal courts decline to recognize any violation of the terms of the instrument by the state because doing so would require us to examine the actions of the state officials. This approach is utterly without precedent. The majority's rule of judicial abdication would, if applied consistently, effectively eliminate judicial review of most contracts or conveyances between the federal government and states.

Second, the majority's examples of park uses approved by state courts do not support its call for judicial non-

intervention. *See* cases cited in majority opinion, slip op. at 16-17. In none of the cases cited did a court refuse to review a challenged park use because it did not wish to interfere with the actions of state park administrators. Each case involved a park use that the court found was consistent with the relevant use restriction. Contrary to the majority's claim, the cited cases do not support a general policy of deferring to the discretion of park administrators. In fact, in one of those cases, *Hyland v. City of Eugene*, 179 Ore. 567, 173 P.2d 464, 466 (1946) (en banc), the court, while approving the use of a public park for temporary emergency housing, noted that were the use of a more permanent nature it would have granted injunctive relief against the administrators.

Although the majority does not so state, it may be that it cites to these cases because it believes that the uses that were found to be within the meaning of public park are somehow analogous to the long-term summer home leases at issue here. However, no such analogy can be drawn. The dedication of public park property for uses such as Little League baseball,[5] public ice skating rinks,[6] other public sporting facilities,[7] public hotels and restaurants,[8] and public parking beneath San Francisco's Union Square[9] involves either limiting some types of park uses so that one particular use may be more readily enjoyed by all interested members of the public, or constructing facilities that will improve the public's access to or use of the park.[10] Granting decade-long leases that turn park land over to private individuals for their exclusive enjoyment and preclude all public access to prime public lakefront property constitutes a wholly different and far less benign use.

[5]*Shields v. City of Philadelphia*, 405 Pa. 600, 176 A.2d 697 (1962).

[6]*Summit County Hist. Soc'y v. City of Akron*, 115 Ohio App. 555, 1983 N.E.2d 634 (1961).

[7]*795 Fifth Ave. Corp. v. City of New York*, 13 A.D.2d 733, 215 N.Y.S2d 391 (1961); *Harter v. City of San Jose*, 141 Cal. 659, 75 P. 344 (1904).

[9]*City & County of San Francisco v. Linares*, 16 Cal. 2d 441, 106 P.2d 369 (1940).

[10]One other case cited by the majority, *Hyland v. City of Eugene*, 179 Ore. 567, 173P.2d 464 (1946) (en banc), held that it was a permissible public park use to lease out land as sites for mobile homes in order to provide temporary housing for World War II veterans during an extreme post-war housing shortage. As I have already mentioned, the court expressly stated that it would have enjoined the practice had it been of a more permanent nature. *See* text *supra* at 13; *Hyland*, 173 P.2d at 466.

Under the Heyburn State Park leasing program, land that Congress expressly directed by preserved for the enjoyment of the public is privatized for the benefit of a small number of individuals wealthy enough to lease and improve summer homes on lakefront property. These individuals are permitted to spend the summer on the shores of Lake Chatcolet on public land from which the public is barred. There is no way in which Idaho's leasing policy can be said to enhance the *public's* enjoyment of the land. It benefits only the privileged few.

At one point in its opinion, the majority correctly states that "'a park must be for the benefit of the public at large and open for the use and enjoyment of everyone.'" Majority opinion, slip op. at 11 (quoting 67A C.J.S. *Park* at 604-05 (1978)). At another, in response to Idaho's argu-

ment that its leasing program constitutes a public park use because the lessees are members of the public, the majority properly labels such an argument as "disingenuous." *Id.* at 12. However, the majority's then suggests that a system of privatization of park land through long-term leaseholds — a system that prevents public access to the leased land — is somehow analogous to programs designed to enhance public enjoyment of park property. That suggestion is not only ill-founded, but it appears to constitute an inexplicable contradiction of the majority's earlier conclusions.

Third, that the cottage lease cites constitute a small fraction of the total acreage of Heyburn State Park cannot justify a policy of judicial noninterference. The statistic cited by the majority is misleading and irrelevant. Obviously, not all of Heyburn State Park's land is shorefront property on Lake Chatcolet. Almost as obvious is the fact that not all shorefront property is suitable for recreational purposes. A more relevant percentage by which to gauge the effect of the privatization of the leased properties is the fraction of usable lakefront land removed from a public use by the leases. The Tribe offered evidence that some 85% of the shoreline of Lake Chatcolet is too steep for public use, and that the public is denied the use of one-half of the remaining, usable shoreline by virtue of the leasing program. For purposes of summary judgment, we must assume these facts to be correct. Accordingly, 50% would seem to be a more relevant figure for our purposes than the one-third of one percent figure relied on by my colleagues. In short, the majority's suggestion that the cottage leasing program creates only a minimal interference with the public's enjoyment of Heyburn State Park is incorrect; the suggestion is not only based on the use of an inappropriate criterion but is clearly contrary to the evidence.

CONCLUSION

I agree with the majority that in light of the evidence regarding historic park practices we cannot say that Idaho has clearly and unambiguously violated the "public park" restriction of the patent. Accordingly, imposition of the harsh remedy of forfeiture is inappropriate, at least in the absence of a prior judicial declaration as to the rights of the parties. Nevertheless, I would hold that Idaho's practice of granting private individuals the ten-year right to exclusive use and possession of portions of the park for summer homes is inconsistent with the contemporary understanding of the term "public park" use. Thus, I would conclude that Idaho's leasing practice is in violation of the terms of the land patent and would direct the entry of a decree of declaratory relief in favor of the Tribe. I would also remand the matter so that the Tribe could, if it chose, seek an injunction from the district court.

EXHIBIT II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4145

STATE OF IDAHO, Plaintiff-Appellee,

and

MEMBERSHIP OF HEYBURN STATE PARK
LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenor Appellee,

v.

DONALD P. HODEL*, Secretary of the
Department of the Interior of the United States of
America, Defendant

and

THE COEUR D'ALENE TRIBE OF INDIANS
Defendant/Intervenor-Appellant

ORDER

(Filed May 28, 1987)

Appeal from the United States District Court
District of Idaho

Before: REINHARDT, BEEZER and HALL, Circuit Judges

BEEZER, HALL, Circuit Judges:

The petition for rehearing is denied.
Judge Reinhardt would grant the petition.

EXHIBIT III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-231

STATE OF IDAHO, Plaintiff

and

MEMBERSHIP OF HEYBURN STATE PARK
LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenors

v.

THE HONORABLE CECIL D. ANDRUS, et al.,
Defendants and

THE COEUR D'ALENE TRIBE OF INDIANS,
Defendant/Intervenors.

Civil No. 77-2058

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE STATE OF IDAHO, et al., Defendants.

MEMORANDUM DECISION

(Filed November 8, 1979)

This matter is now before the Court on cross motions for summary judgment. This Court has carefully reviewed the pleadings, briefs and exhibits and finds that the basic facts are not in dispute.

I. HISTORY OF THE CASE

United States Senator Weldon B. Heyburn introduced legislation in 1907 to create a national park around

Lake Chatcolet in northern Idaho. The park was to be created out of a portion of the Coeur d'Alene Indian Reservation. The bill was later changed to allow the State of Idaho to buy the land for park use. Congress passed, and President Taft signed, the bill in 1908. The land was then appraised at $11,379.17 and the State forwarded the full amount to the Secretary of the Interior as payment for the lands.

On June 28, 1911, the United States of America, by Patent No. 213295, conveyed the property to the State of Idaho. The patent was issued upon the following terms and conditions:

> The lands are to be by said State held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into exclusive possession, of the said lands. . . .

Senator Heyburn was upset that the limitations had been included and introduced Senate Joint Resolution 144 directing the Secretary of the Interior to issue "a good and sufficient conveyance by patent, in lieu of the conditional patent heretofore issued. . . ." The Senate passed the resolution, but Senator Heyburn died before the House acted.

Following the conveyance, the State of Idaho designated the area as Heyburn State Park. It has since leased

cottage sites within the Park and issued float home permits to private individuals for terms of up to ten years.

In a letter dated March 3, 1976, the Office of the Solicitor of the Department of the Interior informed the Attorney General of the State of Idaho that, by virtue of its leasing practices in Heyburn State Park, "the State of Idaho is not in compliance with the conditions of the conveyance and . . . unless the State undertakes immediate corrective action, all the lands included in the 1911 deed are subject to the forfeiture to the United States."

On March 9, 1976, the Idaho State Board of Land Commissioners decided not to renew the leases as they expired. Despite the action by the Board, the lessees have remained in possession of the leased premises.

The State brought an action on December 30, 1976, asking for a declaratory judgment that it is in compliance with the provisions of the conveyance and, in the alternative, that the Board of Land Commissioners' decision not to renew the leases constitutes satisfactory compliance with the directives of the Department of Interior letter.

Subject to some procedural limitations, the Court allowed the Coeur d'Alene Indian Tribe to intervene as defendant and allowed certain leaseholders in the Park to intervene as parties plaintiff.

The United States, on September 7, 1977, filed suit to enforce the provisions of the patent and to quiet title to the property in the United States. This action was later consolidated with the State's action for a declaratory judgment.

II. ISSUES

At the heart of this controversy lie two major issues:

1. Has the State alienated the lands in violation of the conditions of the patent?

2. Has the State, by virtue of its leasing practices, violated the proviso that the lands are to be maintained solely as a public park, thereby entitling the United States to re-enter the lands?

III. FINDINGS OF FACT

The evidence in the record is undisputed that:

1. The Coeur d'Alene Tribal Council voted unanimously in favor of the creation of a park around Lake Chatcolet;

2. Float homes have existed on Lake Chatcolet since at least 1911, the date title passed to the State, and cottage site leasing has occurred since at least 1920;

3. The practice of leasing cottage sites in public parks was prevalent at the time the patent was issued;

4. The number of leased cabin sites has always been minimal. At the time this action was commenced, the State of Idaho had granted 161 leases covering less than 21 acres. These sites are so located as not to detract from the use of the Park by the public, and in fact have increased the overall use of the Park by the public. The number of float homes is likewise small. At present there are 32 float homes in the Park, all of which are located so as to maximize the use of the Park:

5. The State's issuance of float home permits and leasing of cottage sites continued for over a half century without eliciting any comment or criticism from the Tribe or the United States; and

6. In 1972, an Assistant Area Director of the Bureau of Indian Affairs, on behalf of the Tribe, wrote to the Director of the Idaho Department of Parks suggesting that the cottage site leasing program violated the terms of the patent.

IV. CONCLUSIONS OF LAW

It is clear that the patent conveyed to the State of Idaho a fee simple subject to a condition subsequent, and that the United States retained only a right of entry or power to terminate the estate if the State failed to observe the conditions in the patent.

The Court, in ruling on the motions of the parties in this case, is conscious of the familiar maxim that "equity abhors a forfeiture." This maxim bespeaks a general judicial hostility toward the forfeiture of estates long held by grantees. *Bornholdt v. Southern Pacific Company*, 327 F.2d 18 (9th Cir. 1964). Thompson records that "the courts are inclined not to construe a state of facts as constituting a breach of a condition subsequent unless such a situation clearly exists." 4 THOMPSON ON REAL PROPERTY § 1866, at 626 (1979).

The Alienation Issue.

Defendant observes that the leases are issued on a long-term basis and have been routinely renewed. This, the United States contends, has effectively created a fee

title interest in the leaseholders and entitles the United States to re-enter and repossess the lands. Such is not the law, however. Alienation refers to the passage of title to real estate and occurs only when divestiture has been complete. Since the State is under no obligation to renew the leases, the fact that the leases run for ten years and have generally been renewed does not transform them into absolute conveyances. In *Boulton v. Telfer,* 52 Idaho 185, 12 P.2d 767 (1932), *cert. denied,* 287 U.S. 655 (1932), a homestead entrant had leased the land to plaintiff for grazing purposes. When plaintiff sued the defendant for trespass, the defendant claimed that the homestead entrant, by leasing the land to plaintiff, had alienated the land in violation of federal statutes. The court disagreed: "Alienation within the meaning and spirit of said sections must affect the title or be such a conveyance of such a qualified interest as might become absolute on patent passing from the United States." *Id.* at 192, 12 P.2d at 770. The Court, therefore, concludes as a matter of law that the State has not alienated the lands in violation of the patent conditions.

The Public Park Purposes Issue—Construing the Provisions of the Patent.

The language in the patent which requires that the lands be "held, used, and maintained solely as a public park, and for no purpose inconsistent therewith" is ambiguous. As a result, the language must be construed in light of its meaning at the time title passed to the State. It is an established principle to be applied in construing deeds that "the language of an instrument must be interpreted in light of the subject matter, the apparent object or purpose of the parties and the conditions existing when

the deed was executed." *United States v. Zorger*, 407 F. Supp. 25, 30 (W.D. Penn. 1976), *aff'd* 546 F.2d 421 (3rd Cir. 1976); *National Lead Company v. Kanawha Block Co.*, 288 F. Supp. 357 (S.D. W.Va. 1968), *aff'd* 409 F.2d 1309 (4th Cir. 1969); *Hogan v. Blakney*, 73 Idaho 274, 251 P.2d 209 (1952). *cf. Platt v. Union Pacific Railroad Co.*, 98 U.S. 48 (1978).

Cottage site leasing programs were common in state and national parks when Idaho acquired Heyburn State Park. This fact leads the Court to conclude that the State's practice of leasing cottage sites and issuing float home permits was an accepted public park use at the time title passed to the State.

Although the uses complained of were acceptable public park uses at the time the patent was issued, and thus not prohibited by the terms of the patent, it appears to the Court that the continued existence of private leaseholds in the Park may at some future date encroach upon the use of the Park by the general public. Such use might then violate the terms of the patent. In such a contingency, in view of the long accepted lease practice, equity would require notice be given to the State, and a hearing held to determine whether such use did in fact substantially interfere with the general public's use of the Park. Furthermore, under the facts of this case, the State should in any event be allowed a reasonable time and method to solve existing problems by appropriate action before any forfeiture should be permitted.

Accordingly, the Court concludes that the United States is not entitled to re-enter and repossess the land.

The Court, upon stipulation of the parties and in the presence of counsel, viewed the premises involved in the

litigation. The Park, which was visited by approximately 250,000 people last year, has facilities for picnicking, hiking, swimming, and boating. Camping sites have also been provided for those who wish to stay overnight. Furthermore, the State has plans for expanding the picnicking and camping facilities and has located several areas more suitable for such development than the sites occupied by the cabins. Thus the cabin sites do not presently prevent continued development and use of the Park.

After considering the pleadings and evidence in the record, and after viewing the Park, the Court finds that neither the cabin sites nor the float homes have substantially interfered with the public's use of the Park. In fact, it is likely that, particularly in the Park's early history, the leasing of home sites increased rather than decreased the enjoyment of the Park by members of the public, and provided funds needed to maintain and develop the Park.

In summary, the Court concludes that the leasing of cottage sites and granting of float home permits was a proper public park use at the time Heyburn State Park was established and, therefore, cannot be the cause of forfeiture under the terms of the patent. The Court further concludes that these practices do not now substantially interfere with the public's use of Heyburn State Park. Consequently, the Court concludes that the State is in compliance with the provisions of the 1911 patent.

In light of the foregoing considerations, the Court determines that there are no genuine issues of material fact remaining for resolution, and that, as a matter of law, the State of Idaho is entitled to summary judgment.

DATED this 8th day of November, 1979.

/s/ MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

EXHIBIT IV

COEUR D'ALENE ALLOTMENT AND SETTLEMENT ACT OF 1906, 34 Stat. 335, III Kappler 204

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and sixty acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior as agricultural lands, grazing lands, or timber lands, and shall be appraised under their appropriate classes by legal subdivisions, and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws, at not less than their appraised value, in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre, by proclamation of the President, which proclamation shall prescribe

the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof: *Provided*, That the price of said lands when entered shall be fixed by the appraisement, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry, and in case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall cease, and any payment theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry: *Provided*, That the right to commute by said entryman shall be allowed as to any lands classified as agricultural and grazing lands, but the entryman, upon commutation, shall not be required to pay in the aggregate any sum in excess of the appraised value of such lands; and nothing in this act shall be held to repeal or extend the provisions of the homestead laws permitting the entryman to cut and remove, or cause to be cut and removed, so much timber as is actually necessary for buildings, fences, and other improvements on the land entered: *Provided further*, That the general mining laws of the United States shall extend after the approval of this act to any of said lands and mineral entry may be made on any of said lands, but no such mineral selection shall be permitted upon any lands allotted in severalty to the Indians: *Provided further*, That all the coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States, and no patent that may be issued

under the provisions of this or any other act of Congress shall convey any title thereto: *Provided further,* That the lands remaining undisposed of at the expiration of five years from the opening of the said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold ten years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price: *And provided further,* That sections sixteen and thirty-six of said lands be, and they are hereby, excepted from the foregoing provisions and are hereby granted to the State of Idaho for school purposes, and the United States shall pay to said Indians therefor the sum of one dollar and twenty-five cents per acre: *And provided also,* That if the State of Idaho has made any selections under existing law in lieu of sections sixteen and thirty-six of the lands affected by this act the acreage of such selections shall be deducted from the acreage to be paid for under the preceding proviso.

That the said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter any of said lands except as prescribed in such proclamation.

That the Secretary of the Interior shall reserve from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes as in his opinion may be required for the tfuture public interests, and he may cause any

such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians as provided in section seven of this act.

That the net proceeds arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands, shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales and surveys herein provided, deposited in the Treasury of the United States to the credit of the Coeur d'Alene and confederated tribes of Indians belonging and having tribal rights on the Coeur d'Alene Indian Reservation, in the State of Idaho, and shall be expended for their benefit, under the direction of the Secretary of the Interior, in the education and improvement of said Indians and in the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horserakes, thrashing machines, and other agricultural implements for issue to said Indians, and also for the purchase of material for the construction of houses or other necessary buildings, and a reasonable sum may also be expended by the Secretary, in his discretion, for the comfort, benefit, and improvement of said Indians: *Provided*, That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if in the opinion of the Secretary of the Interior such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise: *Provided*, That any sums placed in the Treasury of the United States to the credit of said Indians shall bear interest

at the rate of three per centum per annum, which interest shall be expended in the same manner as the principal.

That any of said lands necessary for agency, school, and religious purposes, including any lands now occupied by the agency buildings, and the site of any sawmill, gristmill, or other mill property on said lands are hereby reserved for such uses so long as said land shall be occupied for the purposes above designated: *Provided,* That all such reserved lands shall not exceed in the aggregate three sections and must be selected in legal subdivisions conformable to the public surveys, such selection to be under the direction of the Secretary of the Interior and subject to his approval.

That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this act, until all of the lands shall have been disposed of.

That nothing in this act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

That to enable the Secretary of the Interior to allot, classify, appraise, and conduct the sale and entry of said

lands as in this act provided the sum of fifteen thousand dollars, or so much thereof as may be necessary, is hereby appropriated from any money in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided,* That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and otherwise carrying out the provisions of this act.

EXHIBIT V

HEYBURN ACT OF 1908, 35 Stat. 70, 78, III Kappler 326

That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to wit: Sections one, two, and twelve, township forty-six north, range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven, north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township is reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, said conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

EXHIBIT VI

PRESIDENTIAL PATENT OF JUNE 29, 1911

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

Whereas, the Act of Congress approved April 30, 1908 —35 Stat., 70, 78—, authorizes the conveyance to the State of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho, viz: Sections one, two, and twelve, Township forty-six North, Range four West, Boise Meridian; Section thirty-five and thirty-six, Township forty-seven North, Range four West, Boise Meridian; all of those portions of Sections two, three, four, five, six, seven, eight, nine, ten and eleven, Township forty-six North, Range three West, Boise Meridian, lying south and west of the Saint Joe River in said Township; all of those portions of Sections thirty-one and thirty-two, Township forty-seven North, Range three West, Boise Meridian, lying south and west of the Saint Joe River in said Township, to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said State held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion

thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same: expressly excepting and reserving to the United States of America, however, all valuable mineral deposits in the said lands, together with the exclusive right to mine and remove the same, and to permit, license, or authorize the mining and removal thereof, in such manner, upon such terms, and under such conditions as the Congress may prescribe; and also the right to flood or overflow the said lands, and to permit, license, or authorize the same, for domestic, irrigation, and power purposes; and

Whereas, the State of Idaho, by the Act of the Legislature thereof approved March 16, 1909, has appropriated out of the public moneys of said State, and made available, the aforesaid sum so fixed by the said appraisement, for the purchase from the United States of the lands aforesaid: and

Whereas, the State of Idaho has applied to purchase, under and by virtue of the said Acts of Congress and the Legislature of the State, all of the above described lands and has made full payment therefor:

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said Act of Congress, has given and granted, and by these

presents does give and grant, unto the said State of Idaho, all and singular the tracts above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said State of Idaho forever; upon and subject, however, to the terms, conditions, and reservations prescribed by the Secretary of the Interior and hereinabove set forth.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the Twenty-ninth day of June in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-fifth.

(SEAL) By the President: /s/ Wm. H. Taft

By /s/ W. P. LeRoy, Secretary,
/s/ H. W. Bryant, Recorder of the
General Land Office

Recorded: Patent Number 213295

EXHIBIT VII

EXECUTIVE MANSION, *November 8, 1873.*

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory., viz:

Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek: thence in a north-easterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U.S. Grant

EXHIBIT VIII

AGREEMENT WITH COEUR D'ALENE

1887 AGREEMENT

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indians tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1. Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable trace of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2. For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish,

and quitclaim to the United States all rights, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3. The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4. And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5. In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation,

and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6. And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: for the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7. It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8. It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9. It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10. It is further agreed that in the employment of engineers, millers, mechanics, and laborers of ever kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11. It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, as its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12. In order to protect the morals and property of the Indians, party hereto, no female of the Coeur d'Alene

tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13. It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14. This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W.

Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

EXHIBIT IX

39-3613. Continuation of cottage site lease program — (1) The legislature of the state of Idaho recognizes that certain state lands are presently leased for cottage site uses and are subject to leases and contracts duly authorized by law. It is legislative intent to continue to recognize such leases. However, it is also legislative intent that no new or additional lands be platted, subdivided or leased for cottage site leases, unless and until the condition and precedents listed below have been met.

(2) No additional state lands shall be further platted or subdivided, nor any new cottage site leases entered into, unless and until the following provisions have been met:

(a) The department of lands shall have completed a comprehensive planning process, as to its further participation in, and extension of, the cottage site lease program;

(b) The department of lands shall complete a comprehensive planning process as to the extension of cottage site leasing for that immediate geographic area;

(c) No new cottage site leases shall be entered into unless and until and adequate water system and an adequate sewage collection and treatment system have been installed. Both of these systems shall meet applicable state health standards and regulations. (i) The costs for providing these systems shall be incorporated into the annual lease rates for the newly created serviced lots, unless other specific provisions for payment have been required by the state board of land commissioners. (ii) As an alternate means of securing the necessary funds for the construction of water and sewer systems which must meet state standards and regulations, the state board of land commissioners may include as a condition of the new lease the

requirement that the lessee must prepay his share of the construction costs of the water and sewer system. In all cases, however, such prepayment shall be made, and adequate water and sewer systems shall be installed and in operation before such cottage sites may be inhabited.

(3) The provisions of subsection (1) herein shall not apply to unimproved lots within cottage subdivisions in which at least eighty per cent (80%) of the lots already have cottages upon them. [I.C., § 39-3613, as added by 1975, ch. 128, § 1, p. 280.]

EXHIBIT X

67-4202. Heyburn Park — The name of the park created out of Coeur d'Alene Indian reservation by the act of congress of April 30, 1908 (35 Statutes at Large, 78), shall be Heyburn Park, said park being described as follows, to wit:

Sections one (1), two (2) and twelve (12), township forty-six (46) north of range four (4) west, Boise meridian; sections thirty-five (35) and thirty-six (36), township forty-seven (47) north of range four (4) west, Boise meridian; sections thirty-five (35) and thirty-six (36), township forty-seven (47) north of range four (4) west, five (5), six (6), seven (7), eight (8), nine (9), ten (10) and eleven (11), township forty-six (46) north of range thee (3) west, Boise meridian lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one (31) and thirty-two (32), township forty-seven (47) north of range three (3) west, Boise meridian, lying south and west of the Saint Joe river in said township. [Based upon 1911, ch. 89, §§ 1, 2, p. 335; compiled and reen. C.L. 132-5; C.S., § 3090; I.C.A., § 65-3904.]

EXHIBIT XI

67-4204. Heyburn Park — Granting of concessions — The park and recreation board of the department of parks and recreation is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within said park under such restrictions as to use and compensation for use as said board may determine: provided, that no private parties shall be permitted to construct wharves within said park.

The board shall also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people without discrimination as to race, under such rules and regulations as are to be provided as aforesaid. [1911, ch. 89, § 4, p. 335; reen. C.L. 132:7; am. 1919, ch. 8, § 46, p. 68; C.S., § 3092; I.C.A., § 65-3906; am. 1949, ch. 136, § 2, p. 239; am. 1974, ch. 8, § 2, p. 35.]

EXHIBIT XII

67-4218. Department of parks and recreation created. There is hereby created a department of parks and recreation which shall be, for the purposes of section 20, article IV, of the constitution of the state of Idaho, an executive department of state government. [1965, ch. 85, § 1, p. 139; am. 1972, ch. 65, § 2, p. 108; am. 1974, ch. 8, § 8, p. 35].

EXHIBIT XIII

67-4219. Intent of legislature. It is the intent of the legislature that the department of parks and recreation shall formulate and put into execution a long range, comprehensive plan and program for the acquisition, planning, protection, operation, maintenance, development and wise use of areas of scenic beauty, recreational utility, historic, archaeological or scientific interest, to the end that the health, happiness, recreational opportunities and wholesome enjoyment of life of the people may be further encouraged. The legislature finds that the state of Idaho and its subdivisions should enjoy the benefits of federal assistance programs for the planning and development of the outdoor recreational resources of the state, including the acquisition of lands and waters and interests therein. It is the purpose of this act to provide authority to enable the state of Idaho and its subdivisions to participate in the benefits of such programs. [1965, ch. 85, § 2, p. 139; am. 1972, ch. 65, § 3, p. 108.]

EXHIBIT XIV

67-4223. Powers of board. — The park and recreation board shall have the power to. (a) Adopt, amend or rescind such rules and regulations as may be necessary for the proper administration of this act and the use and protection of park and recreational areas subject to its jurisdiction.

(b) Make expenditures for the acquisition, care, control, supervision, improvement, development, extension and maintenance of all lands under the control of the department and to make such arrangements, agreements, contracts or commitments, which may or may not involve expenditures or transfer of funds, with the head of any state institution, department or agency for the improvement or development of lands or properties under the control of the board, or any other department or agency of the state of Idaho.

(c) Appoint advisory, local and regional park and recreational park and recreational councils, to consider, study and advise in the work of the department for the extension, development, use and maintenance of any areas which are to be considered as future park or recreational sites or which are designated as park recreational areas.

(d) Cooperate with the United States and its agencies and local governments of the state for the purpose of acquiring, supervising, improving, developing, extending or maintaining lands which are designated as state parks, state monuments or state recreational areas and to secure agreements or contracts with the United States and its agencies or local governments of the state for the accomplishment of the purposes of this act.

(e) Construct, lease or otherwise establish public park or recreational privileges, facilities and conveniences and to operate said recreational services and to make and collect reasonable charges for their use or to enter into contracts for their operation. The net proceeds derived therefrom shall be credited to the park and recreation fund (hereinafter created) and are hereby specifically appropriated to defray the cost of said public park or recreational services. The department is specifically authorized to enter into contracts with the United States and its agencies which require that the state expend any excess of revenue above expenses for improvements of the recreational or park area from which said excess was derived.

(f) Prepare, maintain and keep up-to-date a comprehensive plan for the development of the outdoor recreational resources of the state; to develop, operate and maintain outdoor recreational areas and facilities of the state, and to acquire lands, waters and interests in lands and waters for such areas and facilities.

(g) Apply to any appropriate agency or officer of the United States for participation in or the receipt of aid from any federal program respecting outdoor recreation. It may enter into contracts and agreements with the United States or any appropriate agency thereof, keep financial and other records relating thereto and furnish to appropriate officials and agencies of the United States such reports and information as may be reasonably necessary to enable such officials and agencies to perform their duties under such programs. In connection with obtaining the benefits of any such program, the park and recreation board shall coordinate its activities with and represent the interests of all

agencies and subdivisions of the state having interests in the planning, development and maintenance of outdoor recreational resources and facilities.

(h) Obligate the state regarding the responsible management of any federal funds transferred to it for the purpose of any federal enactment and, in accordance with the exercise of this responsibility, the state hereby consents to be sued in any United States district court for the recovery of any federal funds that the responsible federal official, department or agency finds have been misused or disposed of contrary to the agreement with such federal official, department or agency or contrary to the provisions of such federal enactment or applicable federal regulations.

(i) Cooperate and contract with and receive and expend aid, donations, and matching funds from the government of the United States and to receive and expend donations from other sources to acquire, develop, operate and maintain outdoor recreational areas and facilities of the state and, when authorized or directed by any act of congress or any rule or regulation of any agency of the government of the United States, to expend funds donated or granted to the state of Idaho by the federal government for such purposes.

Provided, however, the park and recreation board shall make no commitment or enter into any agreement pursuant to an exercise of authority under this act until it has determined that sufficient funds are available to it for meeting the state's share, if any, or project costs. It is the legislative intent that, to such extent as may be necessary to assure the proper operation and maintenance of areas and facilities acquired or developed pursuant to any pro-

gram participated in by this state under authority of this act, such areas and facilities shall be publicly maintained for outdoor recreational purposes. The park and recreation board may enter into and administer agreements with the United States or any appropriate agency thereof for planning, acquisition and development projects involving participating federal-aid funds on behalf of any subdivision or subdivisions of this state. Provided, that such subdivision or subdivisions give necessary assurances to the park and recreation board that they have available sufficient funds to meet their shares, if any, of the cost of the project and that the acquired or developed areas will be operated and maintained at the expense of such subdivision or subdivisions for public outdoor recreational use.

(j) Establish, develop, supervise and maintain through cooperative agreement, lease, purchase or other arrangement the Idaho recreation trail system, with the advice of the coordinator created in section 67-4233, Idaho Code, and consistent with the goals of recreation, transportation and public access to outdoor areas. [1965, ch. 85, § 6, p. 139; am. 1972, ch. 65, § 6, p. 108; am. 1974, ch. 300, § 3, p. 1763.]

EXHIBIT XV

67-4224. Duty of board to acquire, develop, and maintain land — Transfer of jurisdiction. — It shall be the duty of the board to acquire in the name of the state of Idaho by gift, devise, purchase, agreement, or otherwise, such land as in its judgment may be necessary, suitable and proper for roadside picnic, recreational or park purposes and to control, develop and maintain such land and all existing state parks, state monuments and state recreational areas heretofore established, acquired or designated to be used for such purposes, except state historical monuments. Administrative jurisdiction over all parks, park areas and recreational sites and areas, except wildlife access sites operated by the department of fish and game and roadside picnic areas under the jurisdiction of the department of highways is hereby specifically transferred to the department of parks and recreation. [1965, ch. 85, § 7, p. 139; am. 1972, ch 65, § 7, p. 108.]

EXHIBIT XVI

67-4230 Park management — Alienation of land. — From and after the effective date of this act, control, management and administration of the Idaho Veterans Memorial Park shall be vested in the Idaho park and recreation board. The Idaho Veterans Memorial Park shall be maintained as a state park for the use of all the people, and no part, parcel or interest therein shall be alienated without the consent of the legislature; provided, however, that the Idaho park and recreation board may sell, transfer or convey a right of way, easement or parcel of land on the northwest boundary of said property for use as a public highway. [1971, ch. 125, § 2, p. 486; am. 1972, ch. 140, § 1, p. 307; am. 1974, ch. 8, § 10, p. 35.]

Supreme Court, U.S.
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No. 87-199

In The
Supreme Court of the United States
October Term, 1987

STATE OF IDAHO,

Respondent,

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION,

Intervenor/Respondent,

vs.

THE COUER D'ALENE TRIBE OF INDIANS,

Petitioner.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	2
Summary of Argument	4
Argument	5
I. The Ninth Circuit Correctly Decided That Cottage Site Leasing Was a General Custom and Practice in Public Parks in the First and Second Decades of the Twentieth Century.	5
II. The Ninth Circuit Correctly Interpreted Idaho Law When It Held That Leasing Sites Did Not Exceed the Broad Grant of Authority to the Idaho Department of Parks to Manage Idaho Park Lands.	7
III. The Court Correctly Applied the Rule of Construction Against Forfeitures to the Heyburn Park Patent.	8
Conclusion	11

TABLE OF AUTHORITIES

Cases	Page
Choctaw and Chickasaw Nations v. Board of County Commissioners, 361 F.2d 932 (10th Cir. 1966)	11
Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976)	8
Lone Wolf v. Hitchcock, 187 U.S. 566 (1903)	6
Oregon & California Railroad v. United States, 238 U.S. 112 (1957)	10
Perrin v. United States, 444 U.S. 37 (1979)	5
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	7
State of Idaho v. Andrus, 720 F.2d 1461 (9th Cir. 1983) cert. denied, 469 U.S. 824 (1984)	9
State of Idaho v. Hodel, 814 F.2d 1288 (9th Cir. 1987)	3, 8
United States v. Union Pacific Railroad, 353 U.S. 112 (1957)	10
Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979)	9

Statutes and Other Authorities	
Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kapler 204	2, 6
Heyburn Act of 1908, 35 Stat. 70, 78, III Kapler 326	2, 6
1911 Idaho Sess. Laws, Ch. 89, §§ 1-2, p. 335	3
59 Cong. Rec. 4592 (1907)	3

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent State of Idaho and Intervenor/Respondents Membership of Heyburn State Park Leaseholders Association file this joint brief in opposition to the Petition of the Coeur d'Alene Tribe of Indians for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit dated April 9, 1987. The Ninth Circuit's Opinion is reported at 814 F.2d 1288 (9th Cir. 1987).

RESPONDENT'S STATEMENT OF THE CASE

Respondents submit the following material in supplementation and, where noted, correction of the Tribe's statement of the case. The genesis of Heyburn Park was in the Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kapler 204, which opened portions of the Coeur d'Alene Reservation to homesteading. Various parties, including the Coeur d'Alene Tribe, were concerned that a particularly beautiful area of lakes and forests within those ceded lands would pass into private ownership as a result of allotment and settlement. There were some attempts in Congress to make these lands a federal park, but funding concerns led to authorization for a state park.

The Heyburn Act "reserved and withdr[ew] from allotment and settlement" 6,774.65 acres from the lands subject to disposition under the Act of 1906. These lands were subsequently patented to the State of Idaho to be maintained as a public park. The patent states that "the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17." The patent also recites that this purchase price was determined "by appraisement under direction of and approved by the Secretary of the Interior . . . ." The proceeds of the sale were deposited in the United States Treasury for the benefit of the Tribe. (Petitioner's Appendix Exhibit ["Pet. App. Exh."] V & VI).

When the patent was issued, there were approximately 200 floathomes and several summer cabins leased to private parties within the proposed park lands. Immediately after purchase, these lands were established as

Heyburn Park. 1911 Idaho Sess. Laws, Ch. 89, §§ 1-2, p. 335 (See Pet. App. Exh. X). The State of Idaho has continued the practice of leasing floathomes and summer cottage sites by issuing ten-year renewable leases to private parties, with the most recent leases issued in 1983. Less than ½ of 1 percent of the park lands were ever leased to private parties. From 1972 on, the leases included a public right of ingress and egress to and from the adjoining beach. *State of Idaho v. Hodel,* 814 F.2d at 1291 n. 2. In 1975, the Idaho Legislature specifically authorized and ratified existing cottage site leases and imposed public health and planning restrictions on any new cottage site leases. (Pet. App. Exh. IX). In 1976, just before these suits were brought, there were 161 leased sites covering approximately 21 acres and 32 existing floathome permits. The cabin site leases average less than .14 acres each. *State of Idaho v. Hodel,* 814 F.2d at 1290.

Uncontradicted testimony in support of the State of Idaho's Motion for Summary Judgment established that cabin site leasing was frequently used to fund the development and maintenance of large rural public parks. Congress was keenly aware of the funding requirement of such parks and had authorized cottage site leasing in federal parks as a means of offsetting these costs. Congress' reluctance to assume more federal park costs was the very reason for granting Heyburn Park to the State. Leasing cottage sites was discussed as one means of funding a national park on the site. 59 Cong. Rec. 4592 (1907).

———o———

SUMMARY OF ARGUMENT

Petitioner Tribe seeks forfeiture of a 75-year-old state park because ½ of 1 percent of the park's land area has been leased for summer homes. The Tribe argues that the summer home leases violate a provision of the federal patent that the land be "held, used and maintained solely as a public park." Ironically, petitioner seeks to use a condition of the park patent that was designed to protect the public as a means to remove the park from the public domain.

The petitioner's argument turns on an esoteric question of no general applicability: Whether limited leasing of summer home sites was considered a public park purpose in large rural public parks in 1911. This question was fully briefed and considered below. Because it is highly unlikely that this question will arise in any other context, this case does not merit further review. None of the three arguments raised by petitioner are persuasive. The record fully supports the finding of the district court and the Ninth Circuit that limited cottage site leasing was not viewed as inconsistent with the purposes of public parks at the time of the Heyburn Park Patent. Moreover, the leasing practice is not inconsistent with state law or policy. Finally, the Ninth Circuit correctly applied the canon of construction against forfeiture to the Heyburn Park Patent of 1911.

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ARGUMENT

I. The Ninth Circuit Correctly Decided That Cottage Site Leasing Was a General Custom and Practice in Public Parks in the First and Second Decades of the Twentieth Century.

The United States Court of Appeals for the Ninth Circuit adhered to the established rules in construing ambiguous or vague provisions in a statute or patent. The Court held that the intention of the parties at the time of the transactions governs interpretation and that undefined terms will be given their ordinary, commonly understood meaning, *Perrin v. United States*, 444 U.S. 37, 42 (1979). The Tribe's Petition does not argue that the intent of the parties should be judged in light of modern notions of public park use.

The record fully supports the district court's and the Ninth Circuit's determination that cottage site leasing was a general custom and practice in public parks when Heyburn Park was created. The parties exhaustively reviewed the history of public park leasing practices before the trial court. Hundreds of pages of affidavits and depositions were submitted on the issue. The district court judge viewed the sites. (Pet. App. Exh. III at p. 48). Both the district court and the Ninth Circuit's decision were well-considered and based on a full airing of the facts; petitioner has cited no authority to the contrary.

Given that leasing was regarded as a means of funding large rural parks, Statement of Facts, *supra* at p. 2, it is reasonable to infer that Congress would not have disapproved of cottage site leasing as a means of easing

the state's financial burden in managing the park. The prevalence of similar leasing arrangements and Congress' recognition of park funding problems mean that the Heyburn Act and Heyburn Park Patent's failure to address cottage site leasing should not be read as a prohibition.

The petitioner attempts to support its position by explaining that cottage site leasing in Glacier, Lassen, and Mackinac Island National Parks was specifically approved by Congress. This fact is not helpful to the Tribe. Concepts of fairness led the State of Idaho to believe that cottage site leasing would be permissible in state parks as well. Even if Congress chose to expressly approve certain cottage site leases, the petitioner has cited no authority that even suggests that Congress considered cottage site leasing to be impermissible absent specific authorization.

The petitioner contends that the right of reentry reserved by the United States distinguishes this case from other instances of cottage site leasing in federal parks. Yet, the petitioner has failed to explain how the existence of a right of reentry could operate to change then-prevailing notions of permissible public park uses.

Petitioner's argument that the Tribe never consented to the formation of a state park on the land in question is immaterial. When Congress passed the Coeur d'Alene Allotment and Settlement Act of 1906 and the Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326, Congress knew that tribal consent was not required to make the Acts effective. Congress was well aware of its authority over Indian affairs as announced in *Lone Wolf v. Hitchcock*,

187 U.S. 544 (1903). *See Also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 588 (1977).

Finally, as the Ninth Circuit noted, "public park" is an inherently broad and flexible term. Diversity of character is inherent in the broad and flexible meaning of "public park." The Federal District Judge for the District of Idaho was given a view of the park pursuant to a stipulation. This view allowed Judge Callister to compare the cottage site leasing in Heyburn Park with the record of park uses in the early part of the century. This factual basis is necessary to a proper determination of this case, since leasing a .15 acre cabin site would be wholly inconsistent with a .25 acre modern urban public playground, but would be clearly consistent with turn-of-the-century uses of a 6,774.65 acre rural public park enclosing large lakes. Based upon this examination, the trial court determined and the Ninth Circuit affirmed that leasing less than ½ of 1 percent of Heyburn Park was consistent with the record of public park uses before them and thus, within the objective contemplation of the parties to the patent. These judgments should not be disturbed on the basis of the arguments presented by the petitioner.

II. The Ninth Circuit Correctly Interpreted Idaho Law When It Held That Leasing Cottage Sites Did Not Exceed the Broad Grant of Authority to the Idaho Department of Parks to Manage Idaho Park Lands.

The Ninth Circuit interpreted the Heyburn Act and Heyburn Park Patent with deference to the State's authority to administer and operate its state parks. The Tribe does not argue that it is inappropriate to defer to

the discretion of state park managers. Rather, the Petitioner contends that the state's discretion has been circumscribed by a statutory ban on cottage site leasing.

The State of Idaho has plenary power over its own property. *See Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976) *rehearing denied* (1976) (approving state financed construction of dam for leasing to private company). Given the broad delegation of powers to the Idaho Department of Parks (Pet. App. Exh. XI & XIII) and the ratification of existing leases prior to the time suit was brought (Pet. App. Exh. IX), state park administrators have the power to enter into cottage site leases absent a clearly expressed statutory prohibition. No express prohibition is cited by the Tribe, nor is any evident from the record. This argument provides no basis for reversing the Ninth Circuit.

Even if petitioner's argument were correct, it would not change the outcome of the case. The Ninth Circuit cited its deference to the discretion of state park administrators merely to support its analysis. *State of Idaho v. Hodel*, 814 F.2d at 1295. The violation of a state policy cannot change the parties' understanding that limited cottage site leasing was not inconsistent with the public park purposes for which the park was granted to the state. Moreover, any violation of state policy by the director is remedied by an injunction against further leasing, not by forfeiture of the entire park.

III. The Court Correctly Applied the Rule of Construction Against Forfeitures to the Heyburn Park Patent.

The petitioner argues that the canon of liberal construction in favor of Indians should be extended to a

patent between the federal government and the State of Idaho. There is no precedent or rational basis for such an extension.

The canon of liberal interpretation in favor of Indians was first developed in cases involving treaties. It was a recognition of the unequal bargaining position existing between the parties. The canon was later extended to statutes which unilaterally abrogated treaty provisions.

The various cases establish that Congress must show a "clear and plain" intent to abrogate Indian treaty rights. *See Washington v. Washington State Commercial Fishing Vessel Ass'n.*, 443 U.S. 658, 690 (1979). In the present case, the Court of Appeals applied this canon of construction to the Heyburn Act of 1908. This statute was a clear expression of Congress' intent to withdraw certain lands from Indian allotment and settlement and to grant the land to the State of Idaho for use as a public park. However, because the statute did not expressly extinguish the Tribe's beneficial interest, the court ruled that the Tribe retained a beneficial interest in any possible reversion of the land to the federal government.[1] *State of Idaho v. Andrus*, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984).

After narrowly construing the 1908 Act in favor of the Tribe, the Ninth Circuit correctly refused to extend the rule to the 1911 patent. The patent itself abrogated no rights; divestment of the Tribe's interest in the land took

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[1] The State of Idaho and the Leaseholders have consistently asserted that the Tribe has no interest in the reversion. If the petition is granted, the issue of the Tribe's interest in the land would be subject to review.

place in the 1908 statute. The driving force of protecting Indian rights evaporated with tribal title. The patent here should be construed in light of the relationship between the parties to the patent—the State of Idaho and the United States.

There is nothing inherent in the relationship of the parties to the patent which requires departure from the rules of construction normally used to interpret land patents. Respondents concede that, as a general rule, land grants are to be construed favorably to the government. This canon of construction has been used mainly to prevent grantees from claiming mineral rights unless the patent clearly conveyed them. *See United States v. Union Pacific Railroad,* 353 U.S. 112 (1957). However, this Court's reluctance to require forfeitures of patented lands has led it to develop a contrary rule for construing conditions subsequent. If construction of the patent language could lead to a forfeiture, the applicable rule of construction is to avoid the forfeiture.

In *Oregon & California Railroad v. United States*, 238 U.S. 393 (1915), this Court refused to construe breach of a condition subsequent as a forfeiture, despite the fact that the granting act was to become "null and void" if the railroads were not completed in the time required. This Court stated:

> [W]e think the principle must govern that conditions subsequent are not favored, but are always strictly construed, and where there are doubts whether a clause be a covenant or a condition the courts will incline against the latter instruction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so . . . . And it is a general principle that a court of equity is reluctant to

> (some authorites say never will) lend its aid to enforce a forfeiture.

Id. at 420. *See Also Choctaw and Chickasaw Nations v. Board of County Commissioners*, 361 F.2d 932, 935 (10th Cir. 1966) (construing a federal patent granting land "for cemetery purposes only" to avoid forfeiture).

The specific canon of construction against forfeitures was correctly applied by the Ninth Circuit. Any ambiguity in the 1911 patent should not be construed to defeat the expectations that have arisen over three-quarters of a century of continuous public use of Heyburn State Park. The Petitioner's argument fails to present a basis for reversing the Ninth Circuit.

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CONCLUSION

This case does not meet any of the customary tests for granting a petition for certiorari. SUP. CT. R. 17.1(a)-(c). There is no conflict between the circuits of the United States Court of Appeals. There is no conflict between the decisions of a United States Court of Appeals and a state supreme court. The case presents no legal issues of importance or general applicability.

The key question in this case is extraordinarily narrow: Whether limited cottage site leasing was viewed as consistent with the use of a large rural public park at the beginning of this century. That question was exhaustively briefed by the parties and reviewed by both the district court and the Ninth Circuit. The well-considered opinions

of these courts should not be disturbed, and the petition should be denied.

DATED this 27th day of August, 1987.

Respectfully submitted,

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